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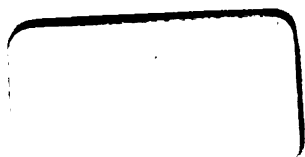
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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**CIRCUIT COURT OF THE UNITED STATES**  
**FOR THE FIRST CIRCUIT.**

---

**By WILLIAM P. MASON,**  
**COUNSELLOR AT LAW.**

---

**VOLUME I.**

**CONTAINING THE CASES DETERMINED IN THE DISTRICTS OF NEW  
HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND,  
IN THE YEARS 1816, 1817, AND 1818.**

**SECOND EDITION.**

---

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**HILLIARD, GRAY, AND COMPANY.**  
**1836.**

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## ADVERTISEMENT.

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THE judicial systems of the United States, and of the separate governments composing the Union, give the promise of so unlimited an increase to the number of volumes forming the library of the American Lawyer, already over-crowded with English reports, that some apology to the profession seems necessary for every additional one that is presented to it.

The present series of reports was commenced at a period when the relations between this country and Great Britain had thrown into the Circuit Courts of the United States an unusual quantity of business, and when the construction of national law, as well as the adjustment of private rights, had given great interest and importance to their decisions.

From the local situation of the First Circuit, a large proportion of the most important cases fell within the jurisdiction of this Court; and it was

thought that a collection of them might not be altogether unacceptable to the profession, nor without some advantage to the jurisprudence of the country. Although the same reasons cannot now be offered for the continuation of these reports, as seemed sufficient to authorize their commencement, it is hoped that those gentlemen of the bar, who have occasion to look into this volume, will not find cause to regret its appearance.

It has been the only object of the present reporter to give a correct statement of the cases as they were presented, and of the decisions of the Court. The arguments of counsel have been added, when the nature of the discussion appeared to call for their insertion. To those, who are acquainted with the legal character of the learned Justice who presides on this Circuit, it will be sufficiently apparent, that this was all that would be left for the reporter to do.

WILLIAM P. MASON.

Boston, January, 1819.

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# CIRCUIT COURT OF THE UNITED STATES.

## Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1815, AT BOSTON.

[Continued from the second volume.]

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN DAVIS, District Judge.

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### UNITED STATES IN ERROR *v.* FARNSWORTH.

What constitutes a concealment of goods within the 69th section of the Collection Act of 2nd of March, 1799, ch. 128.

If an officer of the customs seizes goods, a party, who resists the seizure, is not guilty of concealment within the statute, merely by such act of resistance; although the goods are taken away, and wholly removed from the custody of the officer in consequence thereof.

**T**HIS was a writ of error upon a judgment of the District Court, in an action of debt brought by the United States against the defendant, to recover the penalty prescribed by the 69th section of the Collection Act of 2nd of March, 1799, ch. 128, for concealing goods, knowing them to have been unlawfully imported.

At the trial in the District Court, evidence was offered to show, that certain packages of goods were concealed in a stable of Mrs. Trask in Boston, and were there seized by certain custom-house officers; that at the time of the seizure, the defendant, with other persons, did attempt to rescue the goods so seized, threw a great part of them out of the window of the stable, and finally, by their resistance of the officers, and throwing the goods out of the window, \* succeeded in depriving the #2

officers of the possession and custody of a great portion of the goods, so that they were never afterwards found.

The District Attorney, upon this evidence, prayed the Court to instruct the jury, "that, whether the defendant were or were not concerned in, or privy to, the original concealment of the packages of merchandise referred to, in the stable of Mrs. Trask, still if they should be satisfied, that the defendant was in fact knowingly concerned in impeding the seizing officer or his assistants in the execution of their duty, and in casting the packages from the window of the stable in the manner represented by the witnesses, whereby the seizing officer was deprived of his possession of them, and thus the goods were removed and put away, so that the said officer could not afterwards find or get possession of them, that this would amount, in point of law, to a concealment of the said packages and goods, within the true intent and meaning of the provisions of the 69th section of the act of 2nd of March, 1799, ch. 128. But the Court did, then and there, refuse so to direct or instruct the jury; and, on the contrary, did instruct the jury, that if they were not satisfied by the evidence adduced, that the defendant was concerned in the original concealment of the packages and goods in the stable of Mrs. Trask, or in a subsequent concealment; and if his only offence was in resisting the searching officer and his assistants, and in throwing the packages out of the stable window, in the manner stated by the witnesses for the United States, then he could not be lawfully convicted upon this suit under the 69th section of the act, though the officer was deprived of the possession of the goods by such proceedings on the part of the defendant, and could not afterwards recover the possession of said goods."

- \*3 \*It was contended, on the part of the United States, that there was error both in the refusal, and in the direction of the District Court.

STORY J. The question resolves itself into this, whether the mere acts of resisting the officers of the customs, and casting the packages of goods out of the window of the stable, whereby they were entirely removed from the possession and custody of the officers, constituted *per se* in point of law a concealment of the goods. I cannot yield to the argument, that endeavours to maintain the affirmative. Neither the act of resisting the officers, nor of throwing the goods out of the window, is of itself a concealment, although it may have led to a concealment within the statute. The defendant may have concurred in either or both of these acts, and yet may not have been party to the subsequent removal and concealment of the goods. On the other hand, a person may have concealed the goods, who did not concur in the previous resistance of the officers, or the removal of the goods from the stable. If this be true, then the conduct of the Court, both in the refusal and in the instruction to the jury, was perfectly correct. It is quite another question, whether the evidence would not have warranted the jury to infer, that the defendant was a party to the concealment, as well before as after the seizure. This, however, was a fact exclusively for their consideration, and in respect to which the charge of the Court did not at all interfere. On the whole, the judgment of the Court below must be *affirmed*.

*G. Blake*, for the United States.

*W. Sullivan*, for the defendant.

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The Dash.

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## THE DASH, PORTER AND OTHERS OWNERS.

Prize-money must be distributed according to some written agreement of the parties ; otherwise, it is distributable according to the 4th sect. of the prize act of the 26th of June, 1812, ch. 107. A parol agreement as to distribution is void.

If the shipping articles omit to state the shares, to which some of the officers and crew are entitled, they are still entitled to claim their shares under the prize act. A parol assignment of a share in prizes is void.

**A**PPEAL from the decree of the District Court of Maine in a prize proceeding. In August, 1814, the private armed brig Dash captured the ship Five Sisters, and having taken out her cargo, brought it into Portland, where it was duly libelled in the District Court and condemned, and sold by the Marshal for the benefit of the captors. Ross and Slater were officers, and Marshall, a seaman, belonging to the Dash at the time of the capture aforesaid. Ross claimed five shares, Slater four shares, and Marshall one share in the prize proceeds in the hands of the Marshal of the District for distribution.

The cause came on upon the petition of Seward Porter and others, owners of the Dash, asserting that Ross, Slater, and Marshall had shipped for wages only, and praying that the shares of the prize-money, to which they would have been entitled, if they had not shipped for wages only, might be paid to the owners of the Dash ; and that a decree might pass upon the Marshal accordingly. To this petition Ross, Slater, and Marshall appeared, and filed an intervention, denying the claim of the owners and asserting their own title to their shares of the prize proceeds, as above stated.

At the hearing, the original shipping articles were produced. They were in the common printed form of articles for voyages  
\*5 in the merchant service. The first clause was \*as follows ; " It is agreed between the master, seamen, or mariners of the letter

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The Dash.

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of marque brig Dash, William Cammett master, now bound from the port of Portland to one or more of the southern ports of the United States, thence to St. Bartholomew's and back to a port of discharge in the United States, that in consideration of the monthly or other wages against each respective seaman's or mariner's name hereunto set, they severally shall and will perform the abovementioned voyage, &c." — At the end of the common articles was added a clause, agreeing to defend the brig against the public enemy, and to assist in making prizes, &c. — Then followed these words ; "The net amount of all prizes and prize goods taken during the voyage to be divided in the following manner, viz. one moiety to the owners of the vessel, and the other to be shared among the officers and crew in the proportion set against their names respectively." Against the names of all the officers and crew there is a sum placed in the column of wages, and against some of their names a share or shares of prizes. Ross and Slater were to have thirty dollars per month, and Marshall eighteen dollars ; but no share or shares of prizes were set against their names, or against the names of a major part of the crew.

On another paper, filed among the records of the Court, was an apportionment of the shares of the officers and crew, in which were assigned to Ross and Slater and Marshall the shares, which were by them respectively claimed in their act in Court. And on the same paper was the following memorandum ; "Portland, October 7, 1814. We agree to the annexed apportionment of shares in the brig Dash's crew," &c. signed "Samuel and Seward Porter, William Cammett." The whole number of shares was fifty-nine and one half ; but, on the shipping articles, eighteen \*shares only were specified \*6 against the names of officers or seamen.

There was some testimony in the cause, to show that Ross and Slater had, in consideration of receiving higher wages,

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The Dash.

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(viz. thirty dollars instead of twenty-five dollars per month,) consented in conversation to waive their shares of prize-money in favor of the owners, but there was no written memorandum or agreement to this effect.

The District Judge decreed in favor of the respondents, and from his decree the petitioners appealed to the Circuit Court. The cause was argued by *Prescott* for the petitioners, and *W. Sullivan* for the respondents.

STORY J. delivered the opinion of the Court ; and, after stating the facts, proceeded as follows ;

The prize act<sup>1</sup> declares, that all prizes captured by private armed vessels shall accrue to the owners, officers, and crews of the vessels, by which such prizes are captured ; and, after condemnation, shall be distributed according to any *written* agreement made between them ; and, if there be no such agreement, then one moiety to the owners, and the other moiety to the officers and crew, to be distributed between the officers and crew, as nearly as may be, according to the rules of the navy act.<sup>2</sup> It is therefore clear, that by the express provisions of the prize act, as well as the form of the commission, the officers and crew have a vested interest in all prizes after condemnation. If the quantity of this interest be not ascertained by the written agreement of the parties, it is ascertained by the law. It is an interest capable of being assigned ; and the assignee takes it, not as an equitable, but as a legal interest.<sup>3</sup> But it cannot be granted  
 \*7 or assigned by parol. It is at least \*requisite, that the transfer should be evidenced by writing under the hand of the party.

It is argued, in behalf of the plaintiffs, that here was a written contract as to the division of the prize-money. The shipping articles certainly provide, that the owners shall have

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<sup>1</sup> 26 June, 1812, ch. 107, § 4.

<sup>2</sup> 23 April, 1800, ch. 33.

<sup>3</sup> *Morrrough v. Comyns*, 1 Wils. R. 211.



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The Dash.

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one moiety, and the officers and crew the other ; but the distribution among the latter is not provided for. It is only declared, that they shall have the shares set against their names respectively. Against the names of more than half of the officers and crew no shares are set. The only shares specified are eighteen in number ; whereas it is conceded, the whole number is fifty-nine and one half. It is not pretended, that the parties, whose shares are so specified, are entitled to the whole moiety divisible among the officers and crew ; yet, if the argument of the plaintiffs were right, such would be the legal inference. For, if the division be completely provided for by the shipping articles, those only can take, whose shares are specified. The others would be entitled to no shares ; and of course the plaintiffs and respondents now before the Court would be *hors de la ley*, as to their present controversy.

But such a construction is utterly inadmissible. It is against the express words and intent of the prize act, for that gives a vested interest to all the officers and crew ; and when their shares are not ascertained in writing, it ascertains them by an equitable reference to the distribution of prizes in the navy. Unless, therefore, there be express words of exclusion or of transfer in the articles, the prize act must be let in, to supply the omissions. And it may be very doubtful, how far, consistently with the law, a party could exclude himself, without a transfer, from the vested interest of prize. The respondents must, therefore, be held entitled under the act to reasonable shares in the prizes ; and these shares have been liquidated by common consent to the shares asserted in their claims.

\*The next question is, whether the owners have acquired a \*8 legal or equitable title to the shares of the respondents. It is argued, that the respondents having shipped for higher wages than the rest of the crew, and no shares being set against their names, there is a necessary presumption from the articles, that

they have excluded themselves from prize-money ; and that a resulting trust, as to their shares, arises in favor of the owners, by whom the advance was made ; and that this presumption is fortified by the parol proof.

As to the parol proof, it must be altogether rejected. Supposing it admissible in point of law, it is much too lax and unsatisfactory, to furnish any sufficient ground for a decree. But it is inadmissible in itself. So far as it is applied to the explanation of the articles, it is attempting to give a construction unauthorized by the language of that instrument. It is expressly agreed, that the owners shall have one moiety only of the prize-money ; but this construction will not only give them one moiety, but also a large portion of the other moiety of the officers and crew. It is, therefore, contradictory to the express stipulations of the parties. So far as it is applied to control the distribution, it is liable to this farther objection, that it undertakes to distribute the shares by a *parol*, instead of a *written* agreement, as the prize act requires. And so far as it is applied to sustain an assignment, by parol, of the prize shares, it is useless ; for such an assignment is utterly void.

The only remaining ground, then, upon which the claim of the owners must rest, is that there has been a legal or equitable transfer to them, by the respondents, supported by written proof. There is no suggestion of an *express* written transfer ; but it is supposed, that the articles contain an implied legal or equitable assignment. It is very difficult to comprehend, from what part of that instrument such an implication can arise. It cannot arise from the mere payment of wages ; for this being a voyage \*9 under \*letters of marque for commercial purposes, as well as for captures, it is usual to allow wages ; and here all the officers and crew have expressly stipulated for wages. Nor can it legally arise from the payment of higher wages than usual ; for these depend upon the particular agreements of the parties.

And, in no case, can the payment or non-payment of wages raise a legal presumption against the vested rights of prize. Nor is there any presumption of a resulting trust from the omission to state the shares of the respondents; for the law, in such cases, ascertains the shares for the benefit of the parties themselves, and not of the owners. The argument, therefore, for the plaintiffs is utterly untenable; and the respondents being entitled originally to the shares now claimed by them, must retain that title, since no written assignment can be produced in favor of other persons.

A decree must be entered, that the petition of the petitioners be dismissed; that the prize proceeds, now in the hands of the Marshal, be delivered and paid over to the respondents, according to their claims asserted in the acts of Court; and that a monition issue to the Marshal accordingly; and farther, that the respondents be allowed their reasonable costs and expenses against the petitioners, to be taxed under the direction of the Court.

### PEISCH v. DICKSON.

A factor has, by the general law, the personal security of the owner, as well as a lien on the goods, for his advances; but by contract he may waive the right to a personal responsibility.

What constitute latent and patent ambiguities, and when parol evidence is admissible to explain them.

\* If a consignee of goods agree that for advances made "he will hold for reimbursement on the amount and net proceeds of said goods, *which are only considered answerable for said amount advanced,*" it is a waiver of any personal claim against the owner for reimbursement. \*10

**ASSUMPSIT** to recover of the defendant, a merchant of Gottenburgh in Sweden, a balance alleged to be due on sundry consignments made to him by the plaintiff. The defendant claimed

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Peisch v. Dickson.

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to be allowed in account the difference, (being 6180 rix dollars,) between a sum advanced by him to the plaintiff's supercargo, upon certain goods shipped by the Dolphin, and the net proceeds of those goods. The plaintiff, on the other hand, contended that the defendant, by the contract made between him and the supercargo, had agreed to look to the goods only for his reimbursement. The instrument relied on, to prove this contract bore date on the sixth day of April, 1811, and was signed by the defendant and the supercargo. It described in succession the goods belonging to each shipper, and the terms upon which they were received by Dickson. The following is the clause relating to the plaintiff's goods; viz. "On which goods Mr. R. Dickson has advanced me in iron, window glass, &c. shipped on board ship Dolphin, the sum of R. D. 58,331. 36. 4, for which amount he will hold for reimbursement on the amount and net proceeds of the sales of said goods, *which are only considered answerable* for said amount advanced, as per our agreement; the remainder of the amount and net proceeds he will hold to the order, &c." Upon the construction of this contract a difference of opinion arose at the bar, the plaintiff's counsel contending that it was intended to waive any personal claim on the plaintiff, and to restrict the defendant's security for the repayment of the advance to the goods only; and they relied

\*11 upon the introduction \*of the word "only" in the contract, as decisive in their favor. On the other hand, the defendant's counsel contended, that the contract contained no such restriction, and never was intended to waive the right of a personal claim for the advance; and that the words, in which the restriction was supposed to be contained, were meant merely to exempt the goods of the shippers on freight from being included as a security for the advance on the plaintiff's goods. The plaintiff's counsel then offered parol evidence of the circumstances under which the contract was made, in corroboration of their

construction of the contract. The introduction of the evidence was opposed by the defendant's counsel, upon the ground, that this was not a case of latent ambiguity, but the ambiguity, if any, was patent, and that parol evidence was inadmissible to explain it.

STORY J. It is not very easy to reconcile all the decisions upon the subject of latent and patent ambiguities; and, after several efforts, I have found myself unsuccessful in every attempt to accomplish it. Nothing is clearer than the general rule, — Latent ambiguities may be removed by parol evidence, for they arise from the proof of facts *aliunde*; and where the doubt is created by parol evidence, it is reasonable, that it should be removed in the same manner. But patent ambiguities exist in the contract itself; and if the language be too doubtful for any settled construction, by the admission of parol evidence you create, and do not merely construe, the contract. You attempt to do that for the party, which he has not chosen to do for himself; and the law very properly denies such an authority to Courts of Justice. The difficulty, therefore, lies not in the rule itself, but in applying it to particular cases, where the shades of distinction are very nice. There seems indeed to be an intermediate class \* of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. In such a case, I should think that parol evidence might be admitted, to show the circumstances, under which the contract was made, and the subject matter to which the parties referred. For instance, the word "freight" has several meanings in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems to me, that parol evidence might

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 Peisch v. Dickson.
 

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be admitted of the circumstances, under which the contract was made, to ascertain, whether it referred to goods on board of the ship, or an interest in the earnings of the ship; or in other words, to show in which sense the parties intended to use the term. In the present case, the inclination of my mind is to admit the parol evidence, reserving, however, the right to direct the jury to disregard it, if it shall hereafter appear to me inadmissible or inconclusive; or if, upon farther examination, the language of the contract should appear clear and unambiguous, notwithstanding the attempts to give it a double interpretation.<sup>1</sup>

STORY J., after summing up the facts to the jury, expressed himself to the following effect upon the law of the case.

By the general law, a factor has the security of the person, as well as a lien upon the goods of his principal, for all advances made on them. But he may waive his right to resort to the person, and if he does so, by an express agreement, it will be binding upon him. The agreement relied on in the present case is in writing; and the construction of it is a mere question  
 \*13 of law for the determination of the \*Court, upon which it is bound to instruct the jury. The agreement, in my judgment, contains an express contract, upon the part of the defendant, to look solely to the goods as security for the advances, and to exonerate the person and other property of the plaintiff from all responsibility for the payment. If this be the bargain between the parties, it is perfectly immaterial, whether it be prudent or discreet, or not. It is sufficient, that it is made; and the jury are bound to return a verdict for the plaintiff for the difference between the advance and the net proceeds of the property, when sold. In respect to interest, none is to be

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<sup>1</sup> See *Birch v. Depeyster*, 4 Campbell's R. 385. *Clarke v. Russell*, 3 Dall. R. 415, 421, note.

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Peisch v. Dickson.

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allowed upon the balance of the accounts, unless from the general usage of trade, or the particular course of dealing between the parties, it is satisfactorily proved that interest was, in the understanding of the parties, to be paid.

*Verdict for plaintiff, without allowance to defendant for the advance.*<sup>1</sup>

*Prescott and Gallison, for plaintiff.*

*Dexter and J. T. Austin, for defendant.*

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<sup>1</sup> A bill of exceptions was tendered by the defendant, but afterwards was abandoned. This cause was tried, by consent of parties, by a special jury, as was also an issue in the case of *Harvey v. Richards, adm'r.* at this term. The practice of summoning special juries, appears from the records of our courts, to have been early prevalent in Massachusetts, (a.) but it has been long disused, and there is now no power in any State court of this State, to proceed otherwise than by a jury returned and selected according to the statute provision, by drawing their names from a box kept for that purpose, by the selectmen of every town.

(a.) MSS. Records, Court of Assistants, Suffolk County, March, 1691-2. *Andrew Belcher v. James Lloyd.*—Appeal from the County Court in an action on a charter-party. The appellant desired a special jury of merchants, which was accordingly granted. There are many other like cases.

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The London Packet.

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THE LONDON PACKET, SMITH MASTER, SPANISH CONSUL  
CLAIMANT.

Where the captors have been guilty of irregularity, in not bringing in the papers, or the master of the captured ship, farther proof will be ordered.

Where property is shipped in an enemy's vessel, the presumption of its being enemies' property can only be repelled by strong and clear proofs of a neutral interest.

Circumstances leading to condemnation.

The consul of a nation may claim on behalf of its subjects, in the absence of any authorized agent.

After an appeal, the Court may allow evidence, not received in season to be made a part of the case, to be put upon the record *de bene esse*, with a memorandum of the fact.

**T**HIS was a claim for a parcel of hides, shipped, as appeared by the bill of lading, on the 19th of June, 1813, at Buenos Ayres, on board of a British ship bound to London, for account and risk of D. J. Merino, a Spanish subject, and captured by the private armed brig Argus, in August, 1813. In the District Court, farther proof was ordered for the claimants, but before sufficient time had elapsed for procuring it, the captors pressing for a decision on the evidence before the Court, and that being deemed insufficient to authorize condemnation, the property was restored. The captors appealed to this Court, where the cause was first heard at the October Term, 1814.

From the evidence produced by the captors, it appeared that preparation for resistance was made on board of the British ship; but, upon being informed that the summoning ship was the United States brig Argus, the British commander surrendered to a supposed superior force.

*Blake*, District Attorney, for the captors. 1. If resistance was not actually made, it was intended and prepared for. The mistake of the British commander alone prevented a battle. But it is not necessary for the captors to prove an actual resist-



ance. The mere lading of goods by a neutral on board of an armed ship of the enemy is such an association for resistance, as will subject them to forfeiture. A much less co-operation is sufficient for this purpose.

No distinction is to be made between public armed ships and letters of marque. They are equally commissioned by the government, and the latter are not less ships of war, for being also employed in commerce. But goods found on board of a public armed ship, are condemned as of course. No claim is ever given for them.<sup>1</sup> To ship goods on board of an armed ship of the enemy, whether public or private, is an interference with the acknowledged right of search.

2. By the fifteenth article of the treaty between the United States and Spain, the principle, "that free ships shall make free goods," is expressly recognised. The converse results of course. Spain confiscates the goods of neutrals found on board of enemies' ships. Upon the principle of reciprocity, therefore, which Spain has recognised,<sup>2</sup> the same law is to be enforced against her subjects.

*W. Sullivan*, for the claimant. The question is simply, whether goods of a friend on board of an enemy's ship are subject to condemnation? The law of war makes no distinction between an armed and an unarmed ship.

1. By the *law of nations*, Spain, after the war, retained the right, which she before had, to transport goods, excepting contraband, for her colonies in British ships.<sup>3</sup>

<sup>1</sup> Chitty, *Law of Nations*, 296 to 300. 2 Azuni, 193-195, 109, 145, 201. Bynk. *Law of War*, 100 to 112. Vattel, B. 3, ch. 7, § 115. Ibid. p. 516.

<sup>2</sup> 2 Azuni, 193. 2 Valin, 233, 254, 255. Valin, *Des Prises*, Tom. 2, 252, art. 7. D'Abreu, Part 1. ch. 8, § 6, ch. 9, § 17. Span. Ord. 1718, 1741.

<sup>3</sup> 1 Azuni, 8-10, 77, 85, 90. Chitty, ch. 4, pp. 108, 109.

2. The *law of nations* in no way impairs this right, nor does it restrict the neutral to unarmed ships.<sup>1</sup>

3. If we look to the *conventional law*, we find that for several centuries, the goods of neutrals on board of enemy's ships have been recognised, as exempt from forfeiture.<sup>2</sup>

4. The United States, by their public acts, have repeatedly manifested, that the law is so understood and received by them. In all their treaties it has been their aim to enlarge the freedom of neutral trade, by communicating to the cargo the neutrality of the ship. It is to be supposed, that, in pursuance of the same system, they uphold the principle, that the neutrality of the goods is not affected by the hostile character of the ship. Accordingly we find, that wherever the opposite rule is intended to be adopted, an express provision is thought necessary.<sup>3</sup>

5. The treaty with Spain, which has been cited on the other side, discovers the same solicitude to preserve and extend the rights of neutrals, and to secure the freedom of navigation.<sup>4</sup>

6. The ordinance of Spain also cited for the captors,<sup>5</sup> has  
\*17 not been enforced against us, nor can it be supposed, \* that it will

<sup>1</sup> Vattel, B. 3, ch. 7, § 115, p. 407.    <sup>2</sup> Azuni, 193. Heinecc. ch. 9, § 3.    Grot. L. 3, cap. 16, § 6.    Huber. Tom. 1. cap. 9, § 1.    Chitty, 296—300.

<sup>3</sup> 2 Azuni, 109 to 145.

<sup>4</sup> See 3, 5, 10, 11, and 12 art. of Treaty with Holland. Treaty of 1794 with G. B. art. 17. Treaty with Morocco, art. 3. Algiers, art. 3. Tripoli, art. 2. Tunis, art. 3. Prussia, art. 2. French Repub. § 15, 16.

<sup>5</sup> Art. 15, 16.

<sup>6</sup> The following is the passage alluded to, as we find it in the French translation of D'Abreu:—"Sa majesté étant instruite, que les Anglois se saisissoient des effets de nos Espagnols trouvés à bord des vaisseaux Français et Hollandais, comme on pouvoit le prouver par plusieurs exemples, elle ordonna, en date du 12 Mai, 1741, que sans entrer dans des discussions sur le fondement, que leur prétention pouvoit avoir dans

ever be. No nation, but France and Spain, has ever made such ordinances.<sup>1</sup>

The right of search is confined to neutral ships, and its object is the discovery of enemy's property. As to belligerent vessels, it can have no place, being merged in the general rights of war.

*Dexter*, in reply. 1. The goods of a friend found on board of an armed cruiser of the enemy, with or without actual resistance, are lawful prize. That neutral goods on board of an enemy's ship, are not, for that cause, subject to condemnation, is admitted as the general doctrine of the laws of nations. But this doctrine has qualifications and exceptions. There are many acts, by which the neutral may expose his property to be treated as that of the enemy. Among these must be the lading of his goods on board of an enemy's armed ship. He may, it is true, pass and repass, and transport his merchandise upon the ocean, as he might do before the war, subject only to the rights of the belligerent. But he invades these rights, when he employs the enemy to transport his property and to protect it by force. It is employing the commander and crew of the belligerent to resist the right of search, or, in other words, the right to know, with respect to every ship, whether she has enemy's goods on board. The moment the neutral places his property in a situation, where it is no longer open to examina-

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les traités, elle ne croyoit pas qu'ils eussent un juste motif de plainte ; que les biens des Anglois trouvés à bord des naivres Français et Hollandais, étoient traités comme ceux des Espagnols en mêmes circonstances ; qu'aussitôt que les ministres de France et de Hollande auroient fait en sorte, que les Anglois respectassent les vaisseaux de ces deux puissances à l'égard des biens des Espagnols ; sa majesté feroit examiner ce point des traités, afin que tout fût exécuté avec l'égalité et la réciprocité convenable." — Par. I. ch. 9, § 17.

<sup>1</sup> 2 Valin, 252.

tion and search, he departs from his neutrality, and his goods \*18 become confounded with those of the \*enemy. Nor does it make any difference, whether the armed ship be public or private. The latter, though employed in commerce, are completely vessels of war, possessing all the rights of such, and subject to the same rules.

2. Whether this general doctrine be true or not, yet if in fact there has been resistance, it comes within the principle of cases already decided and generally acquiesced in. Resistance made by the enemy, for the benefit of the neutral, is the same, as if made by himself. Was there then resistance in this case? It was certainly threatened, for the captured ship, having twelve guns, was in complete readiness to fire, and nothing but false information induced a surrender. This, in legal contemplation, was resistance. If the ship attempting search or capture be deterred by a threat of resistance, is not the belligerent as much impeded in the exercise of his right, as if he had been repelled or sunk? How much is necessary to make a combat? If the *Argus* had first fired, and the British ship had immediately struck, without firing a gun in return, it will not be denied, that this would have been a combat, and a reduction by a superior force. An assault is committed at common law, if an arm be but raised in menace. So between these ships, there was, on the part of the *London Packet*, an assault. Had the commander of the *Argus* fired, as he had a right to do, no doubt would have remained. The humanity, which made him omit this, ought not to place him in a worse situation.

3. The effect and meaning of the article in the treaty with Spain is, *that the character of the ship determines that of the property*. The stipulation that "free ships shall make free goods" is put as a part for the whole. The object was to avoid the inconvenience of search in all cases, whether for enemy's property on board of neutral ships, or for neutral property, in order

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to distinguish and save it, on board of hostile ships. If this were not the intention, the \*belligerent would make a concession \*19 without any equivalent. The passages read from Azuni and D'Abreu completely show, that the subject is viewed in this light by Spain. Certain it is, that there is a Spanish ordinance making neutral goods on board of enemy's ships lawful prize.<sup>1</sup> To reciprocate such a provision [would be according to the common practice of nations. This is familiar in cases of salvage, which is only a particular instance under the general rule.<sup>2</sup>

After this argument, an order for farther proof was made by the Court, upon the grounds which will appear in the following opinion, delivered by

STORY J. The British ship London Packet was captured by the private armed brig Argus, Henry Parsons commander, on or about the 30th day of August, 1813, on a voyage from Buenos Ayres to London, and brought into Boston for adjudication. On the trial in the District Court, the ship and all the cargo, excepting 6276 hides, was condemned as enemy's prop-

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<sup>1</sup> D'Abreu, Part I. ch. 8, § 6. Ord. 1718.

<sup>2</sup> The principal questions here argued have since been determined by the Supreme Court of the United States in *The Nereide*, 9 Cranch R. 388. It was there held that actual resistance by the master of an enemy's armed ship did not affect the property of a neutral shipper with forfeiture, unless such neutral shipper coöperated in the resistance. It appears, however, that Sir William Scott, about the same time, decided the same question in a contrary manner. *The Fanny*, 1 Dodson R. 443. The Supreme Court also, in the same case, decided, that the clause in the Spanish treaty, "that free ships make free goods," did not imply the converse rule, "that enemy's ships make enemy's goods;" and farther, that even if Spain applied the converse rule to the United States, the Courts of the United States were not in such a case at liberty to apply the rule of reciprocity.

erty. The hides were claimed by the Spanish consul as Spanish property, and were finally restored, after an order for farther proof. From this decree of restoration, an appeal has been  
\*20 interposed to this Court. There were no invoices of the cargo brought in, but bills of lading only, and the master was released at sea, and put on board of another vessel. The preparatory evidence, therefore, is not of such confidential persons, as may be, and usually are, entrusted with the knowledge of the ownership of the property. There was also an irregularity in not bringing in all the papers found on board of the ship at the time of the capture. Some of the papers, which are asserted to have been of a private nature, are shown to have been delivered back to the master; and we are left without any letters, or customary documents to explain the transaction of the voyage. It is not for captors to undertake to decide upon the materiality of papers, upon any opinion of their own. They are bound to bring in all the papers, and leave the Court to decide upon their real character and consequence. If they conduct themselves in a different manner, it is at their own peril; and they must expect to receive no countenance or assistance from the Court, in aid of their own irregularity. I make this remark from an anxious desire to preserve the utmost exactness in prize proceedings, in as much as they not only affect the rights of our own citizens, but involve the most important interests of neutral nations. It is equally due to our public character as a belligerent nation, and to the integrity of our Courts administering prize law, to discountenance every abuse, and every irregularity, which shall justly have a tendency, in the opinion of foreign sovereigns, to bring into doubt our scrupulous respect for the rights of neutrality, which on other occasions we have so strenuously maintained. Under all the circumstances of this case, I shall confirm the order of the District Court for farther proof, and postpone a decision until that can be brought in.

At the succeeding term (May, 1815,) the counsel of the claimant moved the Court farther to postpone the cause, \*upon \*21 the ground, that by reason of the difficulty of communication, no return had yet been received to the commission sent out under the order for farther proof.

*Blake*, District Attorney, opposed this, contending that the claim of the consul, being without authority from the shipper, was not such a claim, as would protect the property from the operation of the rule, inflexibly observed in Admiralty Courts, that condemnation passes after a year and day.

STORY J. granted the postponement, observing that this case differed from those, to which the rule of a year and day applied. There had been a claim. A consul was authorized to claim in behalf of subjects of his country. It was admitted in other countries, and he should be sorry, if a different rule were to prevail here. It was also to be considered, that in this case, the captain had not been brought in, nor had all the papers. If they had been, a different case, perhaps, would have been exhibited.

At the present term, the farther proof having been brought in, the following decree was delivered by

STORY J. The only question now before the Court is, as to the proprietary interest of 6276 hides, claimed as the property of G. Marino, a Spanish subject, living at Buenos Ayres. The claim was ordered to farther proof in the District Court, and after a considerable lapse of time, that proof has now been brought in. It establishes to my entire satisfaction the national character and domicil of the claimant, and that the hides were originally shipped by him. This however is but a very incon-

siderable advance towards the establishment of the proposition, that the goods, during their transit, were at his risk, and on his  
\*22 account. The \*shipment was in an enemy's vessel, on a voyage to London, a port in the enemy's country ; and under such circumstances a legal presumption arises, that it belonged to an enemy, which presumption can be rebutted only by clear and distinct proofs of a neutral interest. The sole paper found on board at the time of capture, touching this shipment, was a bill of lading, which declares the hides to be shipped on account and risk of the claimant, consigned to Don Antonio Daubana, and, if absent, to William Hieland. There were no invoices, or letters of advice, respecting this, or indeed any other shipment, to any of the consignees. This is a most extraordinary circumstance, and scarcely to be accounted for upon an other supposition, than that there has been a subtraction and concealment of the ship's papers by the enemy's master, or by some other person. At all events, it called upon the claimant to offer the most explicit and decisive proofs of the integrity of his claim. And if the proofs should be doubtful, it could not but authorize the most unfavorable presumptions.

What then is the state of the farther proof now offered to the Court ? There is not any affidavit by the claimant, or his confidential agent or clerk, at the time of the shipment, of his interest in the cargo. This is the usual, and I had almost said the universal document, expected and required by prize tribunals. Its absence unavoidably throws a suspicion over the cause ; and as it is wholly unaccounted for, it authorizes me to believe, that there has been a voluntary, if not a studied, omission on the part of the claimant. The only paper in support of the claim is a paper purporting to be a copy of an original letter, which accompanied the shipment. But it is not a little remarkable, that this document stands altogether naked of any



attestations of genuineness by the claimant himself, or by any confidential clerk in his counting-room, or by any comparison \*by a public officer of its contents with the original letter-book of \*23 the claimant. It is simply stated by a gentleman, calling himself the general attorney and conductor of the house of the claimant, to be a true copy. This may be true, and yet the paper, from which it is copied, might have been the spurious production of the same day. Something more was surely necessary to entitle it to credit. It ought at least to have been proved, when the original was written, by what vessel it was transmitted to the consignee, and from what paper the present copy was made, with the other usual attestations of its genuineness, by persons conversant with the transactions at the time when the shipment was made.

Under such circumstances, I cannot say that the presumption arising from the shipment in an enemy's vessel is so far repelled, that restoration of the property ought to be made. I therefore decree condemnation of the hides, as good and lawful prize to the captors, with their costs and expenses.

After the above decree was pronounced, and an appeal entered therefrom, the claimant, stating that he was now in possession of the affidavit of Marino showing the property to be in him, prayed that the case might again be opened; at least so far as to make this evidence a part of it.

STORY J. said, if the decision here were final, he should think it reasonable to open the case, and to examine the farther evidence; and after an appeal, he considered it competent for the Court to allow the evidence to be placed on the record with a memorandum, that it was brought in after the appeal. An order was accordingly entered, that the affidavit be placed on

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file, and transmitted with the record to the Supreme Court *de bene esse*, subject to the order of that Court.<sup>1</sup>

*Dexter and Blake*, for the captors.

*W. Sullivan*, for the claimant.

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THE GEORGE, ALMY MASTER.

Probable cause is a sufficient justification for a capture. But such protection may be forfeited by subsequent misconduct or negligence. What constitutes probable cause.

Effect of false and simulated papers.

Captors are bound to good faith and ordinary diligence; and are therefore liable for ordinary negligence.

To constitute probable cause for capture, it is not necessary that there should be *prima facie* evidence to condemn. It is sufficient if there be circumstances, which warrant a reasonable suspicion of illegal conduct.

THIS was a case of an American ship, captured by an American cruiser, and afterwards recaptured by the British, and condemned in their courts. The owners proceeded against the captors for restitution in damages, alleging the capture to be illegal, and that the captors, by sundry irregularities, had forfeited the protection otherwise indulged them by the law.

The cause was argued, at this term, by *Prescott* and *A. Townsend* for the claimants, and by *Pitman* for the captors. The argument, having been mostly confined to the facts, is not reported.<sup>2</sup>

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<sup>1</sup> At February Term, 1817, this cause was heard in the Supreme Court, and upon the hearing ordered to farther proof, with a direction to produce the original documents referred to in the proofs before the Court. 2 Wheat. R. 371.

<sup>2</sup> Townsend cited 2 Valin, Comm. 270. Azuni, ch. 3, art. 4, § 2, 4, 5, note 193. Bynk. *per* Dupon. 3. *Purviance v. Angus*, 1 Dall. R. 184.

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**STORY J.** This is a libel for damages for an alleged illegal capture of the brig George and cargo by the private armed ship Orlando, Babson commander. The brig was captured on the 9th of February, 1815, about the latitude  $39^{\circ}$  or  $39^{\circ} 30''$  N. and longitude  $69^{\circ} 30''$  or  $70^{\circ}$  W., and ordered to the United States for adjudication; and afterwards, on the 16th of the same month, was recaptured by the British, and carried into Halifax, and there, together with her cargo, condemned as lawful prize. The cargo on board, at the time of the capture, consisted of cotton, rice, molasses, tar, and reeds; and the brig purported to be on a voyage from Georgetown (S. C.) to New Bedford, (Mass.) The testimony in the cause as to the conduct of the captors, as well at the time of the capture as afterwards, is very voluminous, and it is not necessary to be minutely stated. There is no controversy, that the brig and cargo were owned by the libellants, who are American citizens.

The principal questions made at the argument are, 1. Whether there was probable cause for the capture. 2. If there was, whether the protection was not forfeited by the subsequent misconduct and negligence of the captors in the navigation of the prize.

Before I proceed to the consideration of these questions, it may be proper to dispose of a preliminary objection taken to the conduct of the captors at the moment of capture. It is admitted, that a belligerent has a right to search every vessel found upon the high seas, in order to ascertain her national character and conduct; but in respect to neutrals, the search is to be conducted with as little trouble and vexation as possible. In the present case, the commander of the Orlando fired a shot in

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*Maley v. Shattuck*, 3 Cranch R. 458 — 488. 1 Rob. R. 95. 3 Rob. R. 129. 6 Rob. R. 316. For the captors were cited, *The Maria*, 4 Rob. R. 287, 350. *The Catharine*, 4 Rob. R. 210, 211. *The Lively*, ante, 1 Vol. 324, 325.

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\*26 the first instance, to compel the George to round to ; and ordered the master to bring his \*papers on board the privateer for examination. In strictness of law it may perhaps be true, that belligerents have no right to compel neutrals to bring their papers on board of the searching ship ; and that the search is to be made by the belligerent on board of the neutral ; and all that the latter is obliged to do, is to act frankly and fairly in the disclosure of his papers and voyage, and to offer no resistance to a complete and thorough examination of his vessel and cargo. It may, therefore, be an irregularity to compel a neutral, under the terror of superior force, to leave his own ship, and submit to examination and search elsewhere. And perhaps, if not strictly required by the law of nations, it would comport best with the common rules of courtesy and amity between nations, not to fire a shot, until the vessel had been, by some previous signal, required to heave to, and had refused. Assuming, however, these principles to be correct, (in respect to which I do not decide,) still these are, after all, but irregularities in the exercise of a known right, and so common, and I had almost said universal, in practice, that the correct principle, if it exist, as stated, seems almost wholly lost sight of. And I do not know, that any penalty has ever been attached to such irregularities ; although, perhaps, in a case of gross irregularity, attended with immediate and serious injury and damage to the parties, it might not be unfit to entertain a claim for remuneration before the proper prize tribunal.

To return to the principal questions ; it is asserted by the counsel for the libellants, that to constitute a probable cause of capture, the circumstances of the case must be such, as *primâ facie*, and standing alone, would furnish a good ground of condemnation ; or that, if this be not correct, the most indulgent rule is, that it should be a case of such doubt, as to call for farther proof at the least ; and that, if a court of prize would

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restore without farther proof, it would be conclusive evidence of a defect of probable \*cause. In support of these positions, the <sup>27</sup> cases of *Murray v. The Charming Betsy*,<sup>1</sup> and *Maley v. Shattuck*,<sup>2</sup> have been relied on as authorities. Upon a careful examination, these cases will not be found to warrant any such positions. Nor have I been able to find such a doctrine asserted in any elementary work or prize report. There can be no doubt, that where there is *prima facie* evidence to condemn, or so much question and difficulty, as to require farther proof, the captors are completely justified. But that these are the only tests of a probable cause for the capture, I am by no means prepared to admit. In *Locke v. The United States*,<sup>3</sup> the Supreme Court held, that the terms "probable cause," according to their usual acceptation, meant less than evidence, which would justify condemnation, and in all cases of seizure, have a fixed and well known meaning; that they import a seizure made under circumstances, which warrant suspicion. In my judgment, the terms must receive the same exposition in reference to matters of prize. If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct, of the parties, it is proper to submit the cause for adjudication before the proper prize tribunal; and the captors will be justified, although the Court should acquit without the formality of ordering farther proof.<sup>4</sup>

The circumstances relied on by the captors, to justify their conduct in the present case, are, 1. that the vessel had no log-book on board; 2. that an artificial leak was then in operation, to deceive the captors; 3. that a British license was found on board in possession of one of the charterers, which was not pro-

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<sup>1</sup> 2 Cranch R. 64.

<sup>2</sup> 3 Cranch R. 458.

<sup>3</sup> 7 Cranch R. 339.

<sup>4</sup> *The St. Antonius*, 1 Acton R. 113.

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duced until a personal search was made on him ; 4. that there  
\*28 were a simulated register, sea-letter \* and log-book, and false  
shipping articles on board, pointing altogether to a fictitious for-  
eign voyage ; 5. that the brig was out of her proper course for  
the port of New Bedford.

The absence of a log-book is certainly an unusual occurrence, even in coasting voyages, in this part of the country. But it is now shown by the evidence in the case, not to be unusual in coasting voyages from New Bedford. It is an important document, and the only one, which to a visiting cruiser can truly show the nature and course of the voyage, and explain any apparent deviation from the asserted destination. However, therefore, it might be in time of peace, a prudent master would hardly choose in time of war to hazard any thing by the want of such a customary document. There was, moreover, a false log-book on board, purporting to have been kept on a foreign voyage, immediately connected with or preceding the present. This circumstance was calculated to increase the suspicion excited by the absence of a genuine log-book. However, on this circumstance alone, no great stress has been laid.

The British license was signed by Lord *Sidmouth*, dated on the 12th of September, 1812, and to remain in force during nine months. It authorized any vessel, not French, to import into the port of Cadiz, from any port of the United States, a cargo of grain, flour, meal, or rice, notwithstanding the vessel and cargo might belong to a citizen of the United States, and permitted the master to receive his freight, and return with his vessel and crew to any port not blockaded. Upon this license was the following indorsement ; "The brig *George* of New Bedford, burthen one hundred and seventy-two tons, Jacob Alny master, has cleared at New York for Cadiz, with a cargo of corn and flour, this seventh day of May, 1813." The simulated sea-letter, the seal of which was in fact genuine, and the shipping articles, pur-

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ported to be for the same voyage. Upon the same shipping articles there was a memorandum, \* dated the 13th of September, 1813, at Lisbon, and purporting that the George had arrived there in distress on her voyage from Cadiz to New Bedford, and had been condemned as unseaworthy, and that her crew had been upon that account discharged there, and this memorandum purported to be signed by the American Vice-Consul. There was another memorandum on the same paper, which was actually signed by the crew on board of the George at the time of the capture, agreeing 'to go from the port of Lisbon to Amelia Island, there to be discharged,' and the spurious log-book applied to this latter voyage, beginning the 6th of October, and ending the 18th of November, of 1814. There is some contrariety of evidence as to there having been a simulated register on board, though a considerable weight of testimony is in favor of the allegation. In my view of the case, it is quite immaterial, whichever way this fact is settled. There was on board, a genuine enrolment of the George for the coasting trade, granted at New Bedford, in February, 1812; and a license pursuant thereto for one year from the 11th of November, 1814; and also a manifest and clearance of the vessel and cargo at Georgetown (S. C.), in January, 1815, and sundry letters respecting the shipments.

Here, then, there were false and genuine papers, mixed up together; and the question is, whether the captors were bound, at their peril, to unravel the fraud, and to trust to the explanation of the parties on board, or had a right to submit the whole to the scrutiny and decision of a prize tribunal.

As the George was licensed for the coasting trade, it was illegal for her to engage in any foreign voyage or trade whatsoever, under the penalty of confiscation of vessel and cargo. And, if the fact of such illegal traffic were clearly established, it would not only have justified the capture, but, upon principles well

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settled, would have drawn after it a condemnation of vessel and cargo in the prize court. It is a well known rule, that though municipal forfeitures are not directly enforced in courts of prize; yet as no claim can be there sustained, which is tainted with illegality, they are indirectly enforced in a manner fatal to the supposed rights of the party with reference to the mere question of prize. Was there not, then, from the papers, a reasonable cause of suspicion, that the vessel had, since her enrolment, been engaged in a foreign voyage at Cadiz, and at Lisbon? Some of the papers explicitly avow the fact; and how were the captors to know, which were genuine, and which were spurious? It has been emphatically said, "that if neutrals will weave a web of fraud, a court of prize will not take the trouble of picking out the threads for them, in order to distinguish the sound from the unsound."<sup>1</sup> And it would be perilous indeed, if captors were bound to decide upon the integrity and genuineness of every contradictory paper submitted to them, under the penalty of responsibility in damages for a mistake.

Farther, it is argued that the British license could furnish no ground for reasonable suspicion of illegal traffic, because it appeared upon the face of it to have expired long before the period of capture. Let us examine this argument in connexion with the circumstances of the case, and the principles of law applicable to this subject. Whatever may have been the case formerly, it is very clear, that the British courts now construe their licenses with great liberality, both as to time and objects. It is a general rule, that where no fraud has been meditated or committed, and the parties have been prevented from carrying the license into literal execution by a power, which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and \* strictly fulfilled. And, therefore, it has been held, by very high authority, that if the

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<sup>1</sup> *The Enrom*, 2 Rob. R. 8.



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The George.

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license has expired, and the parties can show, that they have used due diligence, but have been prevented by accidents or obstacles not within their control from carrying their intentions into effect within the time limited by the license, they shall still be held within its protection.<sup>1</sup> With these principles in view, we shall find, that the sole object of the simulated papers was, to give a coloring to the case, that should entitle the ship-owners to avail themselves of the plea, that the non-compliance with the literal requisitions of the license arose from superior force and unavoidable accident. And if such necessity or accident had intervened, what was there incredible in the supposition, that the brig was returning from Lisbon to New Bedford, by a circuitous route, warranted by the objects of the voyage, viz. by the way of Amelia Island and Georgetown? And if such voyage had been actually performed, it would have been somewhat difficult to exempt the vessel and cargo from that penalty, pronounced by the law upon all property, sailing under the passport or license of the enemy.

But it is said, that the contrivance was too inartificial, and the coloring too thin and slight, to deceive any, even the most credulous persons; and that the captors could not but have seen through the disguise. It is somewhat singular, that such a suggestion should come from the parties, who fabricated the contrivance, and gave it, for the purposes of deceit, its primitive coloring. The very explanation now offered to the Court is, that it was to be used for the purpose of deceiving the enemy, on the outward voyage from New Bedford to Georgetown. And if it would have deceived British cruisers on the outward voyage, it is somewhat difficult to perceive, why it might not have equally \*passed for genuine with American cruisers on the homeward \*32 voyage. In any view, this suggestion does not come with a very

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<sup>1</sup> *The Goede Hoop*, 1 Edw. R. 337.

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The George.

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good grace from the libellants. It somewhat resembles the case of an artisan crying down his own manufactures.

It is said that all these contradictory appearances were explained, or offered to be explained, by the master to the captors. But I am not aware of any rule of law, that requires captors to rest satisfied with mere verbal explanations of gross contradictions in written documents. What security could they have, that the explanations were not a part of the concerted plan of deception? Nor was the conduct of the master, and other persons on board, at all calculated to do away any suspicions arising from the papers. The artificial leak, the attempt to bribe, the absence of the log-book, the apparent deviation from the *most usual* route of the voyage, and the withholding of the British license until a compulsory search, were facts of themselves not without some significancy in deciding on the integrity of the transactions. It is also material, that the simulated papers were not produced by the master; but were found upon the person, and in the trunk, of Mr. Leslie, who called himself a passenger, and denied having any papers, but who in fact was a joint charterer of the vessel, and part owner of the cargo. Nor was a second British license, dated the 14th of April, 1814, and granted by Sir *James Saumarez*, ever produced or admitted to exist by the master. It was found on board by the prize master, after the vessel had been taken possession of as prize. This license authorized an importation, in an American vessel, of wheat, grain, tar, &c. from the United States into St. Andrews and St. John's in New Brunswick, and though by its own limitation it had expired, it could not but have had a tendency to inflame every other suspicion. If it were necessary, I am not aware, that it is not now competent for the captors to avail

\*33 themselves \* of any legal cause of suspicion or of condemnation, which is presented by the papers, although such cause might not have been known at the time of capture.

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The George.

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It is not, however, in my judgment, necessary to resort to this special ground. It is a clear principle of the law of nations, that a ship must, in time of war, be provided with complete and genuine papers; and if there be false or colorable papers on board, touching the voyage, the captors have a right to bring her in for adjudication.<sup>1</sup> They are not bound, at their peril, to judge of the degree of guilt or innocence of the party, nor to decide as to the truth of verbal explanations of serious difficulties by the captured crew. It is undoubtedly allowable to use stratagems to deceive the enemy; but if these stratagems may also deceive friends, it is at the peril of those, who use them, and not those, who may have been betrayed into a mistake by their existence. Supposing even, that the counsel were right in their law, (which is not admitted) that to justify a capture, the case must be of such doubt as to require farther proof, it seems to me difficult to conceive, how it could be possible for any Court, consistently with principle, to dispense with the production of such proof under the circumstances of the present case. The proofs, now offered, afford a satisfactory explanation; but it should be remembered, that these proofs are such, as could not have appeared upon an original hearing as prize. In my judgment, therefore, there was probable cause for the capture; and the suspicions of illegal traffic were reasonable, so as to give the benefit of the title of a *bonæ fidei* possession to the captors.

The next question is, whether the captors have, by their conduct, forfeited the protection afforded by that title. The law is clear, that a *bonæ fidei possessor* is not responsible \*for casual- \*34 ties; but he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered

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<sup>1</sup> Duke of New-Castle's Letter, Coll. Jurid. 129. Wheaton on Captures, App. 317.

as a trespasser from the beginning.<sup>1</sup> But it is not every irregularity that will produce this effect. It must be such as produces an irreparable loss, or at least the very damage, for which compensation is sought from the Court. It has been said, by the counsel for the libellants, that the law exacts from captors more than ordinary diligence; that the possession by capture is against the will of the owners, and is *strictissimi juris*; that it does not therefore come within the general doctrine as to bailments; but the possession being by force, the party is bound to extraordinary diligence, and is punishable for slight neglect. The authority relied on,<sup>2</sup> certainly does not authorize any such conclusions. Sir *W. Scott*, in the case alluded to, was answering an objection of another sort, viz. that captors were bound for such care only, *as they would take of their own property*, which, with great propriety, he denies, and asserts the rule to be, that they are responsible for *due* diligence. And it is obvious, that by "due diligence" he understood such diligence as a *prudent* and *discreet* man would exercise about his own affairs, which is precisely the legal definition of ordinary diligence. This construction is corroborated by other decisions of the same learned Judge, and particularly, by that in the *Maria* and *Vrouw Johanna*.<sup>3</sup> Nor am I able to distinguish the case, upon principle, from that of a bailment beneficial to both parties, where, of course, the captors would only be held responsible for ordinary neglect.

It is farther argued, that in the present case there was a want  
 \*35 even of ordinary diligence. Various circumstances \*are relied on for this purpose, which I will now proceed to consider. In the first place, it is alleged, that the prize master was not a per-

<sup>1</sup> *The Betsy*, 1 Rob. R. 92.

<sup>2</sup> *The William*, 6 Rob. R. 316.

<sup>3</sup> 4 Rob. R. 348. See also *The Carolina*, 4 Rob. R. 256. *The Catherine and Anna*, 4 Rob. R. 39.

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The George.

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son of sufficient skill, and did not prosecute the voyage with all due diligence. I do not think, that this objection is sustained in point of fact. Independent of the natural presumption from his station, there is the direct testimony of a gentleman, perfectly conversant in affairs of this nature, in his favor. It is intimated, that he was not always temperate; but no delay or injury is shown to have arisen from this circumstance, even if its existence be completely established. From the manner too, in which the charge is made by the witnesses, I do not think, that this was a frequent or serious occurrence; and it has been very justly remarked, that in a mode of life peculiarly exposed to severe peril and exertion, something of indulgence is to be allowed, and that slight acts of this nature afford no conclusive proof of disability for general maritime employment.<sup>1</sup>

In the next place, it is alleged, that the master and Mr. Leslie ought to have been allowed to remain on board to assist in the navigation of the vessel. Without adverting to their conduct at the time of the capture, it is a sufficient answer to this objection, that it is founded upon a misconception of the law. Captors are not permitted to take out the whole of the captured crew, and indeed ought to allow the master, or some of the principal officers, to remain on board. And the prize court will animadvert with severity upon any unnecessary deviation from this salutary practice. But the rule has no reference to the navigation of the ship; it is adopted with a totally different view. It is to prevent embezzlements and frauds, and to bring before the prize court, to answer upon standing interrogatories, persons, who, from their stations and privity with the owners, can \*speak to the \*36 national character and proprietary interest of the ship and cargo. The captors are not bound to allow the captured crew to navigate the ship; nor are the latter bound to perform such duty.

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<sup>1</sup> *The Exeter*, 2 Rob. R. 261.

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The George.

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They may agree so to do, and in such case will be held to their agreement ; but, if no such agreement be made, the captors are bound to put on board a sufficient crew to navigate the ship, and are responsible, if any damage happen from their neglect in this particular.

It is, in the next place, alleged, that there was no time-piece on board, to regulate and ascertain the course of the ship. It does not, however, appear, that any inconvenience or embarrassment arose from this omission. The vessel was so near the coast, and the soundings and course of the voyage so well known, that it is highly probable no importance was, at the time, attached to this circumstance. And it is somewhat singular, that so usual and customary an instrument as an hour-glass, was not on board belonging to the brig. It is sufficient, however, that there is no evidence, that the capture by the British was occasioned by this defect.

In the next place, it is alleged, that there was negligence in not putting on board a prize master, who was a good pilot for all the harbours on our coast ; and that there was negligence in the prize master in not going into Portland or Portsmouth, instead of attempting to reach the port of Gloucester. But no such general knowledge of pilotage can surely be required or expected. For most of the important ports on the coasts, regular or occasional pilots exist, and particularly for the ports above mentioned. It is therefore sufficient, if the prize master has reasonable skill in navigation, and knowledge of the position of the coast, so as to make a good harbour, or avail himself of the proper pilot ; and there is no reason to impute to the present prize master, a deficiency of this skill. Nor am I aware of any compulsive obligation upon a prize master to go into the first port, \* that presents itself, even if it be practicable. The laws of the United States contemplate, that captors have a right to remove prizes from one district to another, even after they have arrived at a port of safety. It would certainly be harsh to require, that a prize

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The George.

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should be carried into the first port, which presents, however inconvenient to the parties, or remote from the scenes of their business. From the very nature of things, the prize master must have a right to exercise a reasonable discretion in such cases; and if he exercise his judgment fairly, and no known and imminent danger require a different course, it seems to me the law will protect him, although in the event it may turn out, that the port selected by him was not the best, and that a loss might have been prevented by a different choice.

In the case at bar, it is not satisfactorily made out in evidence, that the prize master was guilty of delay or mismanagement in the conduct of the voyage, or in the selection of a port. He appears to have acted with good faith; and the port of destination, if not the best, was certainly a safe and proper one.

These are the material circumstances, from which a want of ordinary diligence has been attempted to be inferred; and it is almost unnecessary to add, that they have failed in their purpose.

I have passed over in silence many facts and circumstances, as to which the parties have employed a minute diligence in procuring proofs, because the cause must, after all, be decided by great and general principles, and cannot rest upon the comparison of the testimony, as to unessential facts. I am aware of the importance of the cause, and the amount of property involved in the decision. The parties have now had the best judgment, which I have been able to form; and if it be erroneous, it is some consolation, that a superior tribunal can award ample justice to the injured.

\* I pronounce against the claim for damage, and affirm the \*38 decree of the District Court, and order the libel to be dismissed with costs.

*Prescott and Townsend*, for the libellants.

*Sprague and Pitman*, for the captors.

## THE SAN JOSE INDIANO, FELIS MASTER.

In general the Prize Court will not trust a claimant with an order for farther proof, who has shown himself capable of abusing it. Every shipment remains on the account and risk of the shippers, unless there be an express or implied authority to change the proprietary interest, and put the shipment at the risk of the consignee. Defects of the case on farther proof, inflame suspicions. Circumstances leading to condemnation.

THE farther proof ordered in this cause, as to invoices Nos. 1 and 2, part of the goods claimed by the master, being now brought in, the counsel of the respective parties were heard by the Court. The circumstances attending this claim are fully stated in the opinion of the Court, delivered at October Term, 1814.<sup>1</sup> The nature of the farther proof, now produced, will appear in the opinion which follows : —

STORY J. The only remaining claim, now to be decided, is that of the master, as to the property in the invoices Nos. 1 and 2, respecting which farther proof was ordered at October Term, 1814. That order was made under very special circumstances ; and if it can be reconciled at all with the rules of the prize court, it stands upon the very limits of the law. It was made in favor of a party, whose statements under oath were contradictory, and who was finally detected in an attempt to practise an

\*39 \*imposition on the Court by the cover and claim of property, which has been condemned as the property of enemies. The difficulties also of the claim, as to the invoices Nos. 1 and 2, were very serious, and were in part stated in the opinion, which was then delivered, and to which I again refer. The master was then personally present in Court, and so strong were the solicitations of counsel in his behalf, as a foreigner, seeking the compas-

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<sup>1</sup> 2 Gallis. R. 263.



sion of the Court, and so earnest was their belief, that every explanation could be made by him to its entire satisfaction, that the indulgence was yielded after considerable doubt of its legal propriety. It is a clear rule of public justice, enforced for the most obvious reasons by prize courts, that a party shall not be trusted with an order for farther proof, who has already shown himself capable of abusing it.

Under these circumstances the party was put upon his utmost diligence ; and was distinctly informed, that the clearest proof and documents would be expected, to relieve the claim from the weight, with which it was oppressed ; and that the apparent contrarieties and singularities must be minutely explained.

The farther proof has now been brought in, and it consists altogether of a certificate of a Mr. Da Costa of Lisbon, not under oath ; and of an affidavit of Mr. Da Costa of Liverpool, one of the firm of Da Costa, Guimaraens, & Co., the owners of the ship. The master himself has offered no supplemental affidavits or documents explaining the contrarieties in the case, or showing any funds or special circumstances, from which so large a shipment might have arisen. Nor can it be pretended, that he has, in these respects, acted under a mistake. Independent of the admonition of the Court, there are now before me the written instructions of counsel, as to what was proper and necessary to be done ; and these instructions were not only known to the master, but were transmitted to Messrs. Costa, Guimaraens, & Co. It was certainly to have been \* expected, that the master, \*40 before leaving the country, would have given his final explanation of the real transactions, minutely and fully ; and that at least, after the lapse of a year, he would have produced some original documents, either to himself, or to his asserted partner in this transaction, that would have assisted in the verification of his claim. It is in proof, that such documents actually exist. The bills of lading of the invoices Nos. 1 and 2 are without signatures,

and if there be not a mis-translation (as I suspect there is) in the consignment, the production of the originals, in the possession of the shippers, would have been some corroboration of the claim, especially if connected with the "letter of orders" referred to in the certificate of Mr. Da Costa of Lisbon.

This certificate, independent of its not being verified by oath, is essentially defective for every purpose of farther proof. In the claim of the master, two thirds of the shipment were claimed, as the property of the master, and one third as the property of Mr. Francisco Gaudencio Da Costa of Maranham. In the certificate it is nowhere averred, that Mr. Da Costa of Lisbon is the same person, as Mr. Da Costa of Maranham. It was certainly incumbent on the party to show this; and if a removal had taken place, to state at what time the event happened, and what was his real domicil at the time of shipment. If this gentleman had never lived at Maranham, or had removed before the shipment was made, it would have thrown great doubt upon the master's veracity; and in no possible view could it be an unimportant circumstance in clearing away difficulties. The certificate states, that the invoices annexed to it, "are faithfully copied from the respective original invoices of the merchandises therein specified, shipped at Liverpool on board the San Jose Indiano, a Portuguese built vessel, and the property of a Portuguese, Ignacio Jose Felis master, bound for Rio de Janeiro, by Costa, \*41 Guimaraens, & Co. for account of the deponent, \* *concerned* in one third part of the capital and interest, and the other two third parts for account of the said captain of the same vessel, I. J. Felis, *pursuant to the letter of orders given by the shippers* to the above said captain; which said original invoices remain in his possession, *together with their respective documents* sent to him by the aforesaid shippers." This is the whole of the certificate. It is somewhat remarkable, that neither the originals, nor copies of these documents, and letter of orders, are produced, nor the time

of their receipt mentioned by the claimant ; nor does he pretend, that any authority or orders were given by him for the shipment ; nor is there shown any correspondence, or course of trade, between himself and the shippers, from which an implied authority could be inferred. Consistently with the language of the certificate, the shipment might have been made without any authority express or implied, and without any interest in the claimant, except the nominal interest asserted in the papers. The letter, too, of the claimant, addressed to Mr. Sampaio (the agent for the ship and cargo in this Court) which accompanied the certificate, shows in a very marked manner his utter ignorance of the whole transaction. He directs him in every thing to follow the instructions, that Messrs. Costa & Co. have given, relating to this business. The letter is, of itself, calculated to awaken the strongest suspicions ; and, combined with the other circumstances, it cannot but raise a presumption, that Mr. Da Costa of Lisbon is but a dramatic personage, ushered into the scenes, to act a part for the benefit of the original shippers, or some other concealed hostile owner. It is sufficient, however, that the shipment does not appear to have been made in pursuance of any orders ; and it is clearly settled, that every shipment remains on the account, and at the risk of the shippers, unless there be an express or implied authority to change the ownership of the property, \* and \*42 put it to the account, and at the risk of the consignee.

Equally unsatisfactory is the affidavit of Mr. Da Costa of Liverpool. It is a naked declaration, in general terms, and unaccompanied with a single original document, letter of orders, or statement, explanatory of the manner or circumstances, under which the shipment was made. Not a single difficulty, which appeared in the original papers, or in the account current, is attempted to be accounted for ; though certainly it was peculiarly in the power of this gentleman, to have given the most ample and minute information.

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The San Jose Indiano.

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Whether, therefore, we examine the proofs in the case, or the defects, which the parties have had an opportunity to supply, and have neglected to do it, the case now presents even stronger doubts, than accompanied it at the original hearing. A claimant, asserting rights and interests before a prize court, must make them out by competent and sufficient proofs. The *onus probandi* rests on him;<sup>1</sup> and if he fail to relieve the Court from legal doubts as to his title, condemnation must pass to the captors.

There seems, indeed, but one way of explaining the almost total defect of evidence, to support the order of farther proof. And I think, that it is not a rash inference, that a minute disclosure of the facts, on the part of the claimants and shippers would not aid the asserted claim, or sustain the explanations heretofore made. From the defect of the proper proofs, I condemn the goods in the invoices Nos. 1 and 2, as good and lawful prize to the captors, with costs and expenses.

*Dexter and Pitman*, for the captors.

*William Sullivan and Prescott*, for the claimants.

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<sup>1</sup> *The Walsingham Packet*, 2 Rob. R. 77. *The Countess of Lauderdale*, 4 Rob. R. 283.

# CIRCUIT COURT OF THE UNITED STATES.

## Spring Circuit.

NEW HAMPSHIRE, MAY TERM, 1816, AT PORTSMOUTH.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN S. SHERBURNE, District Judge.

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H. T. SAMPAYO v. JOHN SALTER.

Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored.

**A**SSUMPSIT for money had and received. The cause was tried upon the general issue, when it appeared that the plaintiff, in 1812, after the declaration of war, shipped on board of the American vessel called the Dolphin, commanded by the defendant, fifteen hundred barrels of flour, to be carried from Baltimore, where the vessel then was, to Lisbon. On the voyage, the vessel was captured by the British, carried into Bermuda, and there, together with all the cargo, except that shipped by the plaintiff, condemned as enemy's property. The plaintiff being a neutral subject, resident at Lisbon, obtained a restoration of his shipment, which was thereupon sold by the defendant at Bermuda; and the present action was brought to recover the sum of \$ 4478·72, the balance of the proceeds of the sale, which the defendant held in his hands, \*claiming a right to deduct there- \*44 from the stipulated freight for the voyage to Lisbon, or at all events a *pro rata* freight.

Sampayo v. Salter.

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The cause was argued by *E. Cutts* for the plaintiff, and *W. M. Richardson* for the defendant.

STORY J. delivered the opinion of the Court.

There is no pretence for the claim of freight in this case. The freight for the whole voyage cannot be due, for it was never performed, and was defeated by the capture. As to a *pro ratâ* freight, the claim is as little supported. The doctrine upon this subject in *Luke v. Lyde*,<sup>1</sup> and other subsequent cases, rests upon the ground, that there is a voluntary receipt of the goods at an intermediate port of the voyage, and an agreement to dispense with the party's transporting them farther. But it never has been supposed, that a *pro ratâ* freight was due, when by a capture the party has been incapable of performing the voyage, and the shipper has been compelled to receive his goods at the hands of the Admiralty. The plaintiff is, therefore, entitled to a verdict for the whole sum in controversy.<sup>2</sup>

*Verdict for the plaintiff.*

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<sup>1</sup> 2 Burr. 82.

<sup>2</sup> Same point in *Caze et al. v. Baltimore Insurance Co.*, 7 Cranch R. 358.

# CIRCUIT COURT OF THE UNITED STATES.

## Spring Circuit.

MASSACHUSETTS, MAY TERM, 1816, AT BOSTON.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN DAVIS, District Judge.

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### ARTHUR EMERSON v. GEORGE HOWLAND AND OTHERS.

Where a slave was illegally discharged abroad, his master recovered full wages up to the time when he might have returned to the United States.

Of the effect of capture upon the contract for mariners' wages.

Where seamen are discharged abroad without the payment of the three months' wages required by the act of Congress of the 28th of February, 1803, ch. 62, on a libel for wages the Court will enforce the payment of the three months' wages.

**T**HIS was a suit *in personam* for subtraction of mariners' wages, against the owners of the ship *Ann Alexander*.

The material facts were as follows. The plaintiff being owner of a slave, called Ned, at Norfolk, in Virginia, on the 2d of March, 1811, shipped him as a mariner, at the monthly wages of \$22-00 on board of the *Ann Alexander*, Kempton master, on a voyage from Norfolk to Liverpool, in England, and from thence to one or more ports in Europe, and back to her port of discharge in the United States. The ship safely arrived at Liverpool, and sailed from thence for Archangel, in Russia, in January, 1812, and while on the voyage, on the 5th of July following, was captured by \*a Danish cutter, and carried into \*46 Drontheim, in Norway, for adjudication. After the usual proceedings, the ship was finally restored, about the 20th of Sep-

tember, 1812. About ten days before the restoration, Captain Kempton discharged all his crew, under the pretence that they refused to remain any longer, and either had deserted, or intended to desert. The ship did not pursue her voyage to Archangel, under the pretence that a suitable crew for the voyage could not be obtained. In the spring of 1813, the ship took in a cargo of deals, and proceeded to Ireland, and after landing that cargo, went to Liverpool, and from thence sailed for the United States, and arrived at Boston about the 12th of March, 1814.

Ned received his discharge at the same time with the rest of the crew, and Captain Kempton gave him a due bill for the amount of his wages up to that time, and also a letter to his master, in which he spoke with approbation of his conduct during the whole voyage, and stated that he had been captured, and was under the necessity of discharging him. Ned went immediately on board of the barque Frederick, Coffin master, then bound to London, under an engagement to work for his passage without wages. Captain Kempton stated to Captain Coffin, that Ned was a slave; and requested him, on his arrival in London, to procure him a passage to the United States, and to assist him in this object he gave him 5*l.* sterling. The barque proceeded to London, and on his arrival there, about the 1st of November, 1812, Captain Coffin procured a passage for Ned in a cartel, then bound to New York; and gave him the 5*l.* to enable him to proceed from New York to Norfolk. The last time that Captain Coffin saw Ned was on board of the cartel. The cartel arrived at New York on the 29th of March, 1813; but there was no positive evidence that Ned came home in her, or had ever returned to the United States.

\*47 \* The cause was argued by *Aylwin* for the plaintiff, and *William Sullivan* for the respondents.



*Sullivan.* The contract in this case, may be considered in two points of view ; either as entered into by the slave himself, on his own account ; or as made by his owner. The slave having entered into this contract for the purposes of this voyage, it has been annulled in one of two ways ; either, first, by his desertion, or, secondly, by a mutual agreement between him and the master. Was it by desertion ? The vessel, on her return voyage, was captured and carried into Drontheim, from whence, after her release, the master contemplated proceeding to Archangel, but the slave, together with others of the seamen, unwilling to undertake this voyage, refused to continue on board, and actually left the vessel. The master, not being able to avail himself of any legal means of coercing them, was obliged to submit to the loss of them, and they were noted in the log-book for desertion. But if this does not amount to a desertion, yet, it is contended, that there was at least a mutual agreement between the parties, to the discharge of the slave. The depositions in this case, go to prove, that the master, finding that the slave was determined not to continue with him, and being unwilling to consider him as a deserter, thought it best to give him a discharge. There is nothing in evidence to contradict this, unless the letter from the master to the owner of the slave should be considered as so doing ; but this only states the discharge, and affords no ground for the supposition, that it was contrary to the desire of the slave. How is the contract altered by considering it in the other point of view ? that is, as made by the owner of the slave. Here it will be insisted, that whatever might be the power of the owner over the will and conduct of his slave, whilst the latter continued in the same country with the former, still, that in a distant region, where slavery \* is not allowed, the slave \*48 enjoys the same rights as any other citizen, and is able to dissolve a contract made by his owner, if it should be expedient for him so to do.

*Aylwin* contended, first, That the slave did not desert, and, secondly, That he could not rescind the contract.

The only evidence to prove the desertion, is derived from the depositions of the master and mates. Much credit cannot be given to them, for they not only vary among themselves, but are absolutely contradicted by the letter of the master, which, under the circumstances of this case, is more deserving of credit, than any other evidence produced. In that, the master informs the owner of the slave, that he had discharged him, and that he had been *perfectly satisfied with his conduct*, during the time he had been with him; now he surely would not have said this, if the slave had left the vessel without his consent. Nor is it to be credited, that he would not, on the contrary, have made particular mention of that circumstance, had it taken place. But even conceding that the slave did in fact desert, still the subsequent conduct of the master in agreeing to discharge him, and in paying part of his wages was a sufficient remission of the offence; and it cannot, therefore, now be taken advantage of. Secondly, the slave could not rescind the contract made by his owner. If the master found the civil authority of the country insufficient to prevent his desertion, it was in his power to confine him on board the vessel, and this he ought to have done, and not have consented to his discharge, when by that means the owner might lose not only the wages due for the remaining portion of the voyage, but also the slave himself.

The plaintiff asked for wages up to the time of the actual return of the vessel.

STORY J. In future, where seamen are discharged in a  
\*49 foreign port, I shall decree against the owners the whole \* of the three months' wages authorized and required to be paid by the statute of the 28th of February, 1803, ch. 62. The practice has heretofore been to allow only the two months' wages, which

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 Emerson v. Howland *et al.*


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belong to the mariner. But the owner ought not to be in a better situation than if he had complied with the terms of the law; and it is the duty of the Court to see, that it is enforced. The additional month's wages will not, however, be paid over to the mariner, but retained in the registry, for the use of the United States, — to be applied according to the regulations of the statute.<sup>1</sup>

I shall take a little time to consider the present case.

Afterwards, during the term, the following opinion was delivered.

STORY J. (After stating the facts.) Upon the evidence in this case, it is impossible to support the *first point* asserted in the argument at the bar, viz. that the slave actually *deserted* at Drontheim, and therefore has forfeited all title to wages. In the first place, the answer of the respondents admits the amount of the due bill to be wages yet due and unpaid to the plaintiff, and alleges an actual tender of this sum to the proctor of the plaintiff. This alone would be conclusive against the plea of desertion. It is also as clear from the evidence, that the slave behaved himself to the entire satisfaction of the master; for in the letter to his owner, he says, "Ned has behaved himself extraordinary well, while on board, and has discharged every duty with propriety." He adds, "I have had the misfortune to be taken by the Danes, and brought up to this place, and *am under the necessity of discharging your servant Ned.*" And not the slightest hint of *desertion* is suggested in any part of the letter. In the next place, if \*Ned had previously deserted, (of which \*50 I see no reasonable evidence,) the captain's receiving him again into favor, and giving him a discharge, with an acknowledgment,

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<sup>1</sup> See *The Courtney*, 1 Edwards R. 239.

that he was entitled to his wages, was a complete purging away of all the previous forfeitures incurred by the asserted desertion. In every view, in which this defence presents itself, it seems to be as disingenuous, and unsupported, as any, that could have been devised by the owners of the ship.

The next question is, as to the validity of the discharge of the slave at Drontheim. It is the settled rule of this Court, that the capture of a neutral ship does not of itself dissolve the contract of mariners' wages. The utmost effect, that can be attributed to it, is, that it suspends the contract, which is revived or extinguished by the ultimate acquittal or condemnation.<sup>1</sup> The seamen, therefore, are not bound to quit the ship immediately upon the capture, nor can the master compel them to receive a discharge. They have a right to remain by the ship until a sentence of condemnation or acquittal has passed, or all reasonable hope of recovery is gone.

But if, with consent of the master, they leave the ship, they are not prejudiced in their rights; and their title to wages for the previous period of the voyage will be confirmed or destroyed, according to the event of the ultimate adjudication. And such would have been the principles applicable to the present case, if the discharged mariner had possessed a legal capacity to make, and dissolve, the contract for wages. His discharge would then have been a voluntary act, and binding upon him; and as the ship was restored, his title to full wages for the antecedent term of service would have been perfect.

But such a legal capacity can in no respect be attributed to him. The contract for his wages was entered into by  
\*51 \* his owner in Virginia; and must, therefore, be construed with reference to the *lex loci contractus*. In Virginia slavery

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<sup>1</sup> *The Saratoga*, 2 Gallis. R. 164.

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is expressly recognised; and the rights founded upon it are incorporated into the whole system of the laws of that State. The owner of the slave has the most complete and perfect property in him. The slave may be sold or devised, or may pass by descent, in the same manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract; and the perpetual right to his services belongs exclusively to his owner. It follows from these considerations, that the discharge of the slave at Drontheim, even with his *own* consent, was an unauthorized act, and in no respect binding upon the plaintiff. As the latter never assented to, or ratified it, it was, as to him, a *tortious* act, and draws after it all the consequences of an unjustifiable discharge.

The next point, which, in fact, constitutes the principal question in this cause, is, to what time wages are, in this case, to be allowed. The counsel for the plaintiff claims wages up to the time of filing the libel, or at least to the time of the arrival of the *Ann Alexander* in the United States in 1814. The counsel for the respondents on the other hand contends, that no wages under all the circumstances ought to be allowed after the time of the discharge at Drontheim.

If a seaman is wrongfully discharged during a voyage, it is asserted to be a rule of the maritime law, that he is entitled to wages up to the successful termination of the voyage, deducting any wages he may in the mean time have earned in any other vessel.<sup>1</sup> But it may be doubted, if this position is not laid down in too broad and unqualified a manner. Cases may occur, in which the wages for the whole voyage may be a very inadequate compensation; \*as, for instance, where the seaman \*52 is dismissed in a remote part of the world, and has no opportunity to return until long after the voyage is completed.

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<sup>1</sup> Abbott on Shipping, Part 4, ch. 3, § 1, pp. 424, 425.

On the other hand, if the voyage is a long one, and the seaman is dismissed at an intermediate port early in the voyage, and he immediately returns home, wages for the subsequent portion of the voyage, after his return, would be too great a compensation. In the one case the payment would exceed, and in the other fall short of, the damages sustained by the breach of the contract; whereas, by the general principles of the maritime law, as well as the common law, it ought, in both cases, to be equal to the real loss and injury to the party. By the rule of the civil law, if the party be prevented, without his default, from performing full services, he is still entitled to the stipulated hire for the whole period for which he contracted to serve. "*Qui operas suaslocavit, totius temporis mercedem accipere debet; si per eum non stetit, quo minus operas præstat.*"<sup>1</sup> This rule is followed in the maritime codes of foreign nations. By the laws of Wisbuy, (Art. 3d) a mariner unlawfully dismissed during the voyage, is entitled to full wages up to the termination of the voyage; and in addition to this the Hanseatic and French ordinances allow him the expenses of returning to the country of his departure.<sup>2</sup> And a similar rule seems applied, where the vessel is sold in a foreign country, by the *Consolato del Mare*, (ch. 148.) There is much good sense and equity in these regulations; and perhaps if the point were entirely new, it might not be unfit to incorporate them into our maritime code. But our law seems to have adopted a different course. It gives the party compensation for the injury, which he has sustained, \* according to the circumstances of each particular case. The Courts of Common Law usually sustain the claim in a special action on the case for damages for the illegal discharge. But the Admiralty, (which

<sup>1</sup> Pothier's Pandec. De loc. conduct. art. 4, § 4, p. 845. 1 Domat, Civil Law, B. 1, tit. 4, § 9, art. 6, p. 107.

<sup>2</sup> Hanseat. Ord. art. 42. 1 Valin, Com. Lib. 3, tit. 4, art. 10, p. 705.

<sup>3</sup> Pothier. Louage des Matelots, pp. 206, 207.

in this respect is sometimes followed by the Courts of Common Law,) does not hesitate to pronounce for compensation in a simple suit for wages. It is not, that the Admiralty cannot sustain a suit for damages, but it deems it proper to award damages in the shape of wages.

Notwithstanding this diversity on the point, the rules adopted by both Courts in estimating the damages are, or ought to be, the same. In some adjudged cases, indeed, wages up to the successful termination of the voyage have been allowed; in others, wages up to the return of the seaman to the country, where he was originally shipped, without reference to the termination of voyage.<sup>1</sup> But these apparent contrarieties are easily reconcilable, when the circumstances of each case are carefully examined. In all the cases, a compensation is intended to be allowed, which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time, and the expenses incurred by the party. It is presumed, that after his return home, or after the lapse of a reasonable time for that purpose, the seaman may, without loss, engage in the service of other persons; and where this happens to be the case, wages are allowed only until his return, although the voyage may not then have terminated. On the other hand, if the voyage has terminated before his return, or before a reasonable time for that purpose has elapsed, wages are allowed up to the time of his return, for otherwise he would be without any adequate indemnity. Cases, however, may \* occur, of such gross and harsh misbehaviour, or \*54 wanton injustice, as may require a more ample compensation than can arise from either rule. The doctrine, therefore, asserted

<sup>1</sup> *The Beaver*, 3 Rob. R. 92. *The ship Exeter*, 2 Rob. R. 261. *Hoyt v. Wildfire*, 3 Johns. R. 518. *Brooks v. Dorr*, 2 Mass. R. 39. *Ward v. Ames*, 9 Johns. R. 138. *Sullivan v. Morgan*, 11 Johns. R. 66. *The Polly and Kitty*, 2 Peters R. 420, 423, note. *The Gloucester*, 2 Peters R. 403, 406, note. *The Little John*, 1 Peters R. 115, 119, 120.

in the learned treatise of Mr. Abbott,<sup>1</sup> is far from being universal in its application. The qualification, too, of the doctrine, by allowing a deduction of the intermediate earnings in another vessel, is not supported by any authority cited by him for the text.

So far as foreign writers speak on the subject, they uniformly allow full wages without any deduction.<sup>2</sup> It is true, the Civil Law seems in a parallel case to have incorporated the like deduction.<sup>3</sup> But it may well be doubted, if sound policy, or equity, authorizes it. It is not always easy for a mariner, upon his return home, immediately to engage in another service; and to turn him ashore in a foreign country, without friends or protection, is an injury, which is hardly compensated by a mere remuneration for the loss of time. The French ordinance, with great propriety, allows a deduction of the wages earned in the homeward voyage, from the expenses allowed for the return; but never from the wages which would have become due by a completion of the voyage.<sup>4</sup> If, therefore, this deduction of the intermediate earnings be not established by some authoritative decision, it will deserve consideration, whether it be not more consonant to sound policy and justice to disregard it; especially as the laws of the United States manifestly intend to discourage all discharges of our seamen in foreign countries. Perhaps, as  
 \*55 a general rule, the provision of the French ordinance, \* in cases where the voyage is broken up by the act of the owner, or master, after its commencement, is as equitable as any that can be

<sup>1</sup> Abbott on Shipp. Pt. 4, ch. 2, § 1, p. 424.

<sup>2</sup> Laws of Wisbuy, art. 3. Laws of Oleron, art. 13. Kuricke, 707. 1 Valin, Com. 705. Pothier. Louage des Matelots, pp. 206, 207. Curia Phillippica, cited Peters R. 120.

<sup>3</sup> 1 Domat, B. 1, tit. 4, § 9, art. 6, p. 107. 3 Pothier's Pandect. 843, art. 4, § 4.

<sup>4</sup> 1 Valin, Com. 706, 719, art. 5. Pothier. Louage des Matelots, , 205, 207.



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devised, in reference to the ordinary cases of the unjustifiable dismissal of seamen in foreign ports. It declares, that in such cases, the mariner shall receive wages, for the time he has served, and also for such farther time, as may be necessary for his return to the place of departure of the vessel, and also a reasonable allowance for the expenses of his return.<sup>1</sup>

In the case now in judgment, the principal ground upon which the claim for wages, up to the commencement of the suit, is attempted to be supported, is, that the slave has never returned to the possession of his owner, or to the United States. But this allegation is not satisfactorily made out in proof. On the contrary there does arise a strong presumption of his actual return to the United States; since he expressed a wish so to do; and he was actually shipped on board of a cartel, which afterwards safely arrived at New York. Under these circumstances the party, who seeks to avail himself of the asserted fact, that he has not returned, should be prepared to repel this presumption, and to

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<sup>1</sup> 1 Valin. Com. Lib. 3, tit. 4, art. 3, p. 686. Pothier. Louage des Matelots, note, 203 — 205.

There is a remarkable difference in the French ordinances between the case of the breaking up of the voyage by the act of the owner or master, and the discharge of a mariner without a valid cause. In the former case, wages are given, up to the time when the mariner has or might have returned home. In the latter case, the whole wages for the whole voyage are given. In both cases there is added the expenses of his return. A corresponding difference is made in the present commercial code of France. In the case of a rupture of the voyage, seamen hired by the month, receive their stipulated wages for the time they have served, and in addition, as an indemnity, *one half* of their wages for the presumed duration of the remainder of the voyage, for which they were engaged, and the expenses of their return. In cases of a dismissal, without valid cause, they are to receive the whole of their wages, and their expenses of return. See Code de Commerce, Lib. 2, tit. 5, art. 257, 270, and Mr. Rodman's very valuable translation of it, pp. 179, 183.

show, that it was not the result of his own negligence or \*default. But if the proof of the fact were positive, there would be intrinsic difficulty in sustaining, in point of law, the claim of wages to the extent prayed for. Neither the master, nor owners of the ship, have guaranteed the return of the slave, or fraudulently prevented it. Every thing indeed seems to have been done to facilitate his return ; and even the discharge itself does not appear to have been occasioned by any wanton violation of good faith.

The utmost extent, therefore, to which, under these circumstances, the law ought to go, should be, to give the party compensation for the ordinary and necessary consequences of the act. It is not pretended, that the master or owner of the ship would have been responsible for the desertion of the slave during the voyage ; and it is not easy to perceive, why they should be for any loss occasioned by his personal misconduct after his discharge.

It is clear, that a free mariner would have no such right or remedy ; and in the case of slavery, as to rights and remedies, the owner is substituted by the law in lieu of the slave. But if the present argument could prevail, the duties and responsibilities of the master and owners of a ship would, in the two cases, materially vary. No correspondent distinction has as yet been recognised, between common mariners, and servants shipped by their masters ; and a slave is in this respect but a servant bound to perpetual servitude. His situation differs but little from that of the *villein* of feudal times. If there had been in the case at bar gross fraud, enticement, or oppression, there might have been some reason to have decreed the compensation by way of punishment ; but in the absence of all these circumstances, it cannot be allowed.

The claim for wages up to the time of the arrival of the ship in Boston is not entitled to more favor ; because it must be taken for true upon the evidence, that the slave actually returned, or

might, but for his own default, have \*returned to the United States, a full year before that period. The utmost extent, to which wages can be allowed, is up to the 29th of March, 1813, the time of the arrival of the cartel, in which he embarked. It does not appear, that up to that time there was any unreasonable delay in his endeavour to return to the United States; and as there were no additional expenses incurred, and no intermediate wages earned, the plaintiff upon the principles, which have been already stated, is fully entitled to this compensation. The decree of the District Court must therefore be affirmed with costs.

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UNITED STATES IN ERROR v. SAMUEL BURNHAM CLAIMANT  
OF CERTAIN MERCHANDISE.

Upon a writ of error, if the verdict below was given upon an immaterial issue, a repleader cannot be awarded; but judgment must be rendered against the party who committed the first fault if there be sufficient matter on which to found such judgment.

In an information on the 50th section of the Collection Act of 1799, ch. 128, it is necessary to allege that the goods were unladen in some port or place within a collection district, without a permit from the collector of that port or district. But it will be sufficient if the fact be so, to allege the port or district to be to the attorney unknown. Material matter, although alleged under a *videlicet*, is traversable, and must be proved as laid. Of the nature and office of a *videlicet*. Where immaterial matter may be rejected as surplusage or not.

It is no ground for a bill of exceptions that a Court refused to instruct the jury on a point of law, which was so stated that it involved an opinion on matters of fact, as where an opinion was prayed "under the circumstances of the case," which were not found as facts.

THIS was a writ of error from a judgment of the District Court of Massachusetts, rendered upon an information *in rem*, against certain goods and merchandise seized on land, by the collector of the District of Boston and Charlestown, at Boston, in said district, for an alleged breach of law. The information charged

in substance, that the goods and merchandise \* being of foreign growth, produce, and manufacture, and liable to the payment of duties on importation, were imported and brought into the United States, in some ship or vessel unknown, from some foreign port or place unknown, and " were afterwards, to wit, on the 15th of January, 1816, unladen and delivered from said vessel within the United States, to wit, at Boston, in said district, without a special license or permit from the collector, naval officer, or any other competent officer of said port, for such unloading and delivery, contrary to the statute in such case made and provided." And it is farther charged, that the duties on the same goods had not been paid, or secured to be paid, according to law ; by reason of all which they became forfeited.

The claimant in his plea alleged, that the duties to which the goods, &c., were liable, had been paid or secured to be paid, according to law ; and that " they were not unladen, or delivered within the United States, without a special license or permit from the collector of the customs of the United States, at the port or district where said goods were first entered, viz. the district of Memphremagog," and that the goods, &c. have not become forfeited as alleged in the information. The replication on behalf of the United States alleged, that the duties on the goods had not been paid, or secured to be paid, according to law ; and " that the same were unladen, and delivered, within the United States, without a special license or permit from the collector of the customs of the United States, at the port where the said goods were entered," and that the same have become forfeited, as in the information alleged, and prayed this to be inquired of by the country ; and the issue was accordingly joined by the claimant. At the trial in the District Court, a bill of exceptions was filed to the opinion of the Court. The bill of exceptions \*59 recited the testimony, depositions, and evidence given \* in the cause, at large, by which, among other things, it appeared, that the

goods were brought from Canada into the district of Memphremagog, of which Derby constituted the sole port of entry, and is the place where the office for the collection of duties is established ; that the collector of the district resided at Irasburg, about fourteen miles from Derby, and within the district aforesaid, where the goods were entered, and bonds taken for the security of the regular duties, and a permit for unlading granted by the collector upon the application of the claimant, without the goods ever having been seen by the collector, or any other officer of the customs, and without the collector knowing whether the goods were at the time of such entry at Irasburg, or whether they had ever been brought to the port of Derby aforesaid. — And thereupon the Attorney for the United States moved the Court to instruct the jury “that inasmuch as the entry, if any such existed, was made at Irasburg, which was not then, nor ever, a legal port of entry, the supposed entry, as also the permit supposed to be founded thereon, must be considered as a nullity, and void, and that the forfeiture of the merchandise must, therefore, under all the circumstances of the case, be considered as resulting of course.” But the said judge did then and there refuse so to direct the jury ; and did then and there, in summing up the cause to the jury, declare, “that although the said town of Irasburg, where the said entry of the goods was effected, was not at the time a port of entry, still he was not prepared to express an opinion, if the jury should find that the goods were entered at Irasburg, that such an entry was merely a nullity, so as to expose the goods to forfeiture merely on that ground,” and the jury then and there rendered their verdict on the issue aforesaid in favor of the claimants, upon which judgment was rendered against the United States.

\* The cause was now argued on the assignment of errors, by \*60  
G. Blake, District Attorney, for the United States, and A. Townsend for the defendant in error.

*Blake.* The question which is presented by this case, is, whether a collector of the customs can enter goods at a port which is not a port of entry. If he cannot, the instrument granted in this case was not such a permit as the law contemplates. The Collection Act of 2d March, 1799, from the 1st to the 18th section both inclusive, designates certain ports within specified districts as ports of entry and delivery. The 18th section of the same act, makes it unlawful to make entry of vessels from foreign ports, at any other than the said ports of entry. The 50th section provides that no vessels from any foreign ports shall be unladen, without a permit from the collector, &c, of the port at which they are so unladen. The 20th section provides for the personal attendance of the collectors, naval officers, and surveyors, at the ports to which they are respectively assigned. Now it appears in this case, that the goods were not entered at a port of entry nor during the attendance of the collector, or any of his officers; under which circumstances we contend the Court ought to have instructed the jury, that the permit given was illegal and void, and, therefore, that no entry was in fact made.

*Townsend.* The question presented by the District Attorney is no longer open to him. The forfeiture in this case is highly penal, and he ought so to have formed his information, as to give notice to the other party what was the ground relied upon; we should then have come into Court prepared to show that the entry was a legal one. The *gist* of the information is, that the goods were entered without a permit, and without the payment of duties, but the jury have found that they were entered by permit, and the bond taken by the government is perfect evidence of the  
\*61 security \* of the duties. The entry at Irasburg, which is an essential fact, has not been relied on, and the gentleman has precluded us from a trial as to that point, by not offering us an issue upon it. The appraised value of the goods, is their value deducting the duties; now, shall it be in the power of the United

States to seize these goods for non-payment of duties, when at the same time there is a paper in the case acknowledging the receipt of them ?

As to the construction which ought to be put on the Collection Act, it is contended that the United States have put their own construction upon it, through their agent, in this case, the collector of Derby. The defendant, entering his goods according to the directions of the officer of the government, who must be supposed acquainted with his duty, and rightly informed of the construction given to the laws relative to his particular department, surely acted under sufficient authority, and it is to be presumed with perfect innocence. And if in consequence of such an entry, the goods should be forfeited, the government become gainers by the ignorance or fraud of their own officers.

*Blake* in reply. Notwithstanding the objections offered to the form of the information, I apprehend that the ground taken by it is the true ground. If it shall be thought by the Court that the entry of goods at a port which is not a port of entry, is an illegal and void entry, then the allegation of the information that there was no permit, is correct. Every part of the Collection Act indicates the intention of its framers, that the goods to be entered should be inspected by the officers appointed for that purpose. The sickness or absence of the collector is provided for by the appointment of other officers to act in his place under such circumstances, and it is evident to every one, that if this were not the case, the frauds committed upon the revenue would be innumerable. The law has gone so far as to leave \*it to the \*62 discretion of the Secretary of the Treasury to increase the number of ports of entry, when he shall think it advisable so to do, the better to provide against the want of proper attention ; but if it is in the power of the collectors to dispense with this attention when their convenience may urge it, the law would be com-

pletely frustrated, and the favors of the collectors be distributed far and wide.

*The Court* here making some remarks upon the pleadings, observed to Mr. Townsend that such were their defects, that even should the point of law raised in the bill of exceptions, be decided in favor of the defendant, still the Court would be obliged to give judgment against the party who committed the first fault, and in that case it would be in favor of the United States ; for notwithstanding the faults of the information, it certainly contained sufficient matter to warrant a judgment, and that the plea of the defendant was insufficient, the issues immaterial, and the verdict of the jury did not reach the real point in controversy.

In answer to this, the counsel for the defendant argued to the Court, that the *videlicet* in the information, and the words introduced under it, alleging that the goods were unladen at Boston, might be rejected as surplusage, by which means the faults in the pleadings would be remedied. But the Court decided, that as the immaterial matter made a part of a material averment, it could not be rejected.

The following opinion was afterwards delivered at an adjourned meeting of the Court.

STORY J. Rarely has any record come before the Court, attended with more embarrassing circumstances, where the merits of the cause lay in so narrow a compass. The information in substance charges, that the goods and merchandise being of foreign growth and manufacture, and liable to the payment of  
\*63 duties, were imported and brought \* into the United States from some foreign port or place unknown, and being so imported, were afterwards unladen, and delivered from the said vessel, within the United States, to wit, at the port of Boston, in the district of Boston and Charlestown, without a special permit or



license from the collector, naval officer, or other competent officer of the said port, for such unlading and delivery, contrary to the statute in such case made and provided ; and it further avers, that the duties to which said goods and merchandise were liable, have not been paid, or secured to be paid, according to law ; by reason of all which, and by force of the said statute, they have become forfeited. It is obvious from this summary statement, that the information rests on the 50th section of the Collection Act of 2d March, 1799, ch. 128 ; and to bring the case within that section, it was neither material, nor proper to allege, that the goods were of foreign growth or manufacture, or liable to the payment of duties, or that the duties due thereon had not been paid, or secured to be paid according to law ; for no such qualifications are incorporated into the language of the section, or are implied by intendment of law. It was the policy of the legislature in order to suppress smuggling, to prohibit any goods, brought in any vessel, from any foreign port, whether of foreign or domestic growth, or manufacture, or whether liable to duties or free, from being unladen without a permit from the proper officer at the port of unlivery. It is generally unnecessary, and often perilous in informations upon revenue laws to make the allegations more broad, or more narrow, than the terms, in which the prohibition is expressed in the statutes themselves. And the present case is an example of the inconvenience of any deviation from the strictness of pleading.

The plea of the claimant alleges, that the duties, to which the goods and merchandise were liable, have been paid or secured to be paid according to law ; and that they were \*not unladen \*64 or delivered within the United States, without a special license or permit from the collector of the United States, at the port or district where said goods and merchandise were first entered, viz. the district of Memphremagog ; and that the goods have not become forfeited as alleged in the information. The replication

alleges, that the duties, to which the goods were liable, had not been paid or secured to be paid according to law, and that the same were unladen and delivered within the United States, without a special license or permit from the collector of the customs at the port where the goods were entered; and that the same have become forfeited, as in the information is alleged; and it concludes with an issue to the country, which is joined by the claimant.

Independent of the objections to these pleadings on account of their inartificial structure and duplicity, the fact put in issue, as to the payment or security of the duties, is upon this information wholly immaterial. If the goods were unladen without a permit, they would be clearly forfeited under the statute, although the duties had been paid or secured; and on the other hand, although the duties may not have been paid or secured to be paid, yet if there has not been an unlading without a permit, the goods would be safe from the penalty of the statute. A verdict, therefore, finding the payment or non-payment of the duties, would be in every view of the information without any legal efficacy.

The other allegation of fact in the plea, upon which issue is taken in the replication, was doubtless intended as a traverse of that averment in the information, which constituted the very gist of the action; but in the terms in which it is expressed, it does not meet the point.

The information charges, "that the said goods and merchandise being imported and brought as aforesaid, were afterwards, \*65 to wit, on the same day of January, unladen \* and delivered from the said vessel within the United States, to wit, at the port of Boston, in the district aforesaid, without a special license or permit from the collector, naval officer, or any other competent officer of the said port, for such unlading and delivery;" the traverse on the plea is, "that they were not unladen or delivered within the United States, without a special license or permit from

the collector of the customs of the United States, at the port or district where said goods were first entered, viz. the district of Memphremagog." The substance of the charge in the information is, that the goods were unladen at Boston, without a permit from the collector, &c., of that port; the substance of the plea is, that the goods were not unladen without a permit from the collector of the port or district where they were first entered, to wit, the district of Memphremagog. The plea, therefore, contains neither a denial, nor a confession and avoidance of the matter in the information; but alleges matter totally distinct, (and even that by way of negative allegation) which, whether true or false, has nothing to do with the controversy between the parties; and the plea might be strictly true in point of fact, and yet the forfeiture charged in the information might have been incurred; for the goods might have been unladen from a vessel at Boston, without a permit from the collector of that port, notwithstanding they might have been first entered and the duties secured, and a permit granted in the district of Memphremagog. The issue joined on this allegation in the plea is, therefore, immaterial; and it has this additional vice, that as it neither traverses nor denies the material averments of the information, it must be deemed in law to admit them.<sup>1</sup> It follows that, as the plea and replication are in this view bad, the verdict founded on them cannot avail the defendant, even \*supposing, that the point of law raised in the bill of excep- #66  
 tions should be decided in his favor; for the Court must pronounce upon the whole record; and if the plea and replication are bad and immaterial, and the information contains sufficient matter to warrant a judgment, (as this certainly does,) there must be a final judgment for the United States. If this had been

<sup>1</sup> *Nicholson v. Simpson*, 1 Str. R. 297. *Blake v. West and Trench*, 1 Ld. Raymond R. 504.

a case originally depending in this Court, a repleader might perhaps have been proper to be awarded ; for although in general, a repleader is not grantable in favor of the person, who made the first fault in pleading, nor where the Court can give judgment upon the whole record ; yet if it appear, that substantial justice will not otherwise be done, the Court might award it. But this Court sits in this cause as a Court of Error, and although the practice was anciently otherwise, a repleader is now never awarded by a Court of Error.<sup>1</sup>

To avoid the effect of these principles, and to save the defendant from the perils of mispleading, it is argued, that in the allegation of the information, that the goods "were unladen and delivered from the said vessel within the United States, to wit, at the port of Boston, in said district aforesaid," the words under the *videlicet* may be rejected as surplusage, so as not to tie up the proof to an unloading at Boston ; and in like manner the words under the *videlicet* in the plea, ("viz. the district of Memphremagog,") may be rejected as surplusage, so as not to tie up the proof to the district of Memphremagog ; and then the issue, though informal, will yet meet the point of the information. This argument proceeds upon the supposition, that the matters stated under the *videlicet* are immaterial ; and that whatever is immaterial may be rejected as surplusage. But it is by no means generally true, that whatever is immaterial may be re-  
 \*67 jected as surplusage. If the \*immaterial matter constitute a part of a material averment, so that the whole cannot be struck out without destroying the right of action, or defence of the party, there the immaterial matter cannot be rejected as surplusage ; but may be traversed in pleading, and must be proved as laid, though the averment be more particular than it need have

<sup>1</sup> *Holbage v. Bennet*, 2 Keble R. 769, 789, 825. *Bennet v. Holbeck*, 2 Saund. R. 317. *Crosse v. Bilson*, 6 Mod. R. 102.

been.<sup>1</sup> The doctrine has in some cases been pressed somewhat farther; and a distinction taken between immaterial and impertinent averments, that the latter need not be proved, though the former must, because relative to the point in question.<sup>2</sup> The true rule seems to be, that whenever the whole allegation may be struck out without affecting the legal right set up by the party, it is impertinent, and may be rejected as surplusage. But if the immaterial matter be sensible in the place, where it occurs, and constitute a part of a material allegation, then it cannot be rejected; but it may be traversed, and must be proved, if put in issue. Nor is it true, as urged in the argument, that matter stated under a *videlicet* is mere surplusage. It is sometimes used to explain, what goes before it; and if the explanation be consistent with the preceding matter, it is traversable. So it is sometimes used to restrain the generality of the former words, where they are not express, and special, and then it is traversable. And whenever a *videlicet* contains matter, which is material, and necessary to be alleged, it is considered as a direct and positive averment, and as such traversable, in the same manner, as if no *videlicet* had been inserted.<sup>3</sup> If the matter alleged under the *videlicet* in the information or plea be tried by these rules, it will not be easy \*to reject it as surplusage. It is evidently explanatory of the generality of the preceding words, and consistent and sensible in the place, where it occurs, and therefore just as much

<sup>1</sup> 2 Saund. R. 206, note 27. *Williamson v. Allison*, 2 East R. 446. *Bristow v. Wright*, Doug. R. 665. *Savage v. Smith*, 2 W. Blackstone R. 1101.

<sup>2</sup> Doug. R. 665. 2 W. Blackstone R. 1101. 2 East R. 446.

<sup>3</sup> *Skinner v. Andrews*, 1 Saund. R. 170. *Stukely v. Butler*, Hob. R. 175. *Hayman v. Rogers*, 1 Str. R. 232. *Bissex v. Bissex*, 3 Burr. R. 1729. *Knight v. Preston*, 2 Wils. R. 332. *Grimwood v. Barrit*, 6 Term R. 460. *Dakin's case*, 2 Saund. R. 291, and note 1. *King v. Stevens*, 5 East R. 254.

a part of the preceding allegation, as if it had been stated without a *videlicet*. The matter, also, under the *videlicet* in the information, was material, and pertinent to be alleged. The 50th section of the Collection Act, on which this information is founded, manifestly contemplates, that the goods are unladen within some port, or place, of a district of the United States, without a permit from the collector of the particular port or district, where they are unladen. If the unloading be within the maritime limits of the United States, before an arrival at any port, the case seems properly to fall within the 27th section, and not within the 50th section of the Act.<sup>1</sup> To bring a case within the purview of the 50th section, it is, therefore, necessary to allege in the information, that the goods were unladen within some port, or other place within a collection district, without a permit from the collector of such district. I do not say, that it is necessary to specify the particular port, or district by its legal name; for it would be sufficient to state it to be unknown to the Attorney of the United States. But it must judicially appear in the information, to be an unloading within some port, or district; and if the United States should choose to specify the particular port, or district, they are bound by the specification. In the present information, the matter under the *videlicet* would, independent of this ground, have been material; because it is referred to in the subsequent part of the allegation. The unloading is alleged to be without a permit from the collector of the same port, and if the words under the *videlicet* were struck out, there would be a material defect in the information. For even supposing that the words, "the said port," could then be referred to the introductory part, so as to mean \* the port of Boston, still, as a collector has no authority to grant a permit, nor is there any necessity of obtaining one from him, except for an unloading within his district,

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\* 1 Gallison R. 115.

there would be nothing remaining in the information to show, that the unlading was within the district of Boston and Charlestown, so as to render a permit from him necessary, or to make its non-existence a cause of forfeiture.

The matter also alleged under the *videlicet* in the plea, (even supposing that the plea, as containing a negative allegation of new matter, could be sustained) is open to many of the observations, which have been already made; and upon other distinct grounds, must be held material. It is, however, unnecessary to review these grounds, because, for the reasons already stated, the plea has a fatal defect.

The insufficiencies of the pleadings, render it unnecessary to consider the point of law intended to be raised by the bill of exceptions. I say, intended to be raised; for the bill of exceptions is so inartificially drawn, that it is very doubtful, if it presents any distinct question of law. The bill contains a very unnecessary and prolix recital of all the evidence given on the trial, in the very language of the depositions and witnesses; the greater part of which evidence is totally impertinent to the point of law. And the District Attorney then prays the Court to instruct the jury, among other things, that a forfeiture of the merchandise must, therefore, "under all the circumstances of the case," be considered as resulting of course. What those circumstances were was matter of fact for the consideration of the jury, and did not properly fall within the province of the Court to ascertain, or decide. It is very clear, therefore, that the Court was not bound to give the instruction in the manner, in which it was asked.<sup>1</sup> The \*proper course would have been, if \*70 the facts, on which the point of law arose, were not in dispute, to have stated them shortly and succinctly, as facts in proof, and prayed the Court to instruct the jury on the law arising out of

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<sup>1</sup> *Smith v. Carrington*, 4 Cranch R. 62.

them ; and if the facts were in dispute, to have prayed the Court to instruct the jury as to the law, if they should find the facts as the party alleged them. I regret extremely, that I have been compelled, by a sense of duty, to take notice of the irregularities in the pleadings and exceptions in this case, which, I am quite sure, were simply owing to the unavoidable haste, in which they were prepared by the learned Counsel. Nothing could have been a more unwelcome and irksome task to me. Irregularity in pleading tends greatly to increase the embarrassments, as well as the labors, of the Court. It also very frequently commits the substantial interests of the parties, and defeats the purposes of justice. It is a melancholy reflection, that much of the time of Courts of justice is employed in ingenious devices, and laborious technical study, to disentangle the merits of causes from the difficulties, in which they are involved by the parties.

I recommend to the Counsel, in this case, to enter into an agreement to set aside the judgment and all the pleadings, and to plead anew, so that the real merits of the cause may be tried at the bar of this Court. If such an agreement be not entered into, for the reasons which have already been mentioned, I shall feel myself compelled to pronounce a reversal of the judgment of the District Court, and to award a final judgment in favor of the United States.

*Note.* Upon this intimation, the Counsel agreed to set aside the pleadings and judgment, and to plead anew.



## UNITED STATES v. WILLIAM BAINBRIDGE.

Congress have a constitutional power to enlist minors, in the navy or army, without the consent of their parents.

Under the navy acts, the consent of the father is not necessary to the valid enlistment of boys in the service.

Of the nature and extent of the paternal power at Common Law.

**H**ABEAS Corpus to Commodore Brainbridge to bring up the body of Robert Treadwell, an infant, of the age of twenty years, and about eleven months.

By the return of the *habeas corpus*, and the other proceedings, it appeared, that he was born in Ipswich, on the second day of August, 1795 ; that in the month of May, 1815, he enlisted into the navy of the United States, to serve two years ; that, after this enlistment, he deserted from the service, and, having been apprehended, was on the nineteenth day of June last past, brought to trial on the charge of desertion before a regular court martial, and, having pleaded guilty to the charge, was, by the sentence of the court, among other things, ordered to serve in the navy of the United States the term of two years from the said nineteenth day of June, and to forfeit all the wages then due to him. He has a father who is still living, and now absent at sea ; and who, previous to his departure, sued out a *habeas corpus* for the liberation of his son, but it failed, from the return of the officer to whom it was directed, that the infant was not in his custody. It was alleged in the affidavits and petition, that the enlistment was without the consent of his father.

The cause was argued by *Simmons* in behalf of the petitioner, and *Aylwin* in behalf of Commodore Bainbridge.

*Simmons.* Robert Treadwell, having a father living, enlisted into the navy without his consent. They now, \* both of them, \*72

wish to avoid the contract of Robert the minor, and obtain his discharge from the service. Is this contract avoidable ?

1st. Congress have no power to pass an act, authorizing the enlistment of minors, without the consent of their fathers. Congress have no power, except that delegated to them in the Constitution ; and all that is not expressly delegated, is reserved by the States. The Constitution gives Congress power "to provide and maintain a navy, and to make rules for the government and regulation of the same." All the authority here delegated may be exercised, without any encroachment on the Common Law rights and relations of parent and child. Those rights and relations, are of as solemn a nature, and as important to be preserved, as contracts.

2dly. Congress have passed no act, authorizing the enlistment of a minor in the navy without the consent of his father.

It is admitted, that the acts of Congress relative to the navy, suppose the employment of boys. The mode of obtaining them must be by enlistment, as no compulsory process, or general requisition, is enacted. Enlistment is a contract entered into by the United States on one part, through the agency of their recruiting officers, and the minor, or the father, or both, on the other part ; but by the Common Law, an infant, under the age of twenty-one years, is rendered incapable of binding himself by contract, except in special cases, as for necessities, &c. This case is not an exception to the general inability to contract. It was not an undertaking to do, what he was bound to do by law, for it was optional, whether he would enlist or not. It was not a contract for his benefit; the situation of a boy in the navy, qualifying himself for the duties of an ordinary seaman, cannot be considered beneficial, either to his moral or physical habits, \*73 promising neither honor nor riches. \* Neither do the cases of beneficial contracts, that are binding on infants, relate to that venereal and uncertain benefit, that may be supposed to result

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from any particular situation, or occupation, but to contracts relating to real estate and specific property.<sup>1</sup> This contract, then, is not an exception from the general rule, and not binding on the infant, but the father is the natural guardian of the son, and has a right to control his person, and dispose of his services and labor; the consent of the father is, therefore, necessary to render the contract valid.

In this case, the consent of the father was not given. Is this inability of the minor, or are these rights of the parent taken away by the acts of Congress? No words to that effect are used, and it must be by implication, if at all; and such construction is unwarrantable, because it is unnecessary, in order to carry the statutes into effect. Boys may be enlisted by the consent of the father, and the contract is valid; therefore, where no such consent appears, the contract is voidable.

But it is said, that the minor having been convicted of desertion by a naval court martial, and, among other things, sentenced to two years' labor in the navy, is barred from having his discharge; because it would annul the sentence of the court-martial. He was there tried for desertion, and, while in the navy, and his enlistment *primâ facie* binding, he was undoubtedly bound to obey the rules and regulations of the navy, and subject to punishment for any violation of them; it is a consequence of his contracts being merely voidable, at his, or his father's instance. The question before this Court is the validity of his enlistment; and if he be discharged, the annulling of the sentence of the court martial is only an incidental consequence. It never could have been intended by Congress, that the officers of \*the navy, who \*74 appear to be almost a party, should settle a question of this description, especially where the father is interested, and has no notice, and is not heard at the trial. This question must be de-

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<sup>1</sup> *Zouch v. Parsons*, 3 Burr. R. 1794.

terminated by investigating the power delegated to Congress by the Constitution, a legal construction of their Acts, and the principles of the Common Law, relative to parent and child, for which a naval court martial cannot be supposed competent, and to determine which, they are not authorized.

I have not been able to find any cases in point in the English books. In the Criminal Courts of England, indictments are sustained against indented apprentices for enlisting into the army or navy, and thereby fraudulently obtaining the king's money ; from which I infer, they may be reclaimed by their master after enlistment.

*Aylwin* contended, 1st. That the contract, as made by the minor, was a valid one.

2d. That if it was in the power of the minor to avoid it, yet that could not be done after he had been legally sentenced by a court martial.

The authority given by the Constitution to Congress, for the purpose of raising a navy, must necessarily invest Congress with all such powers as are indispensably requisite for effecting that purpose.

If, then, the nature of the naval service is such, as to require, that the individuals who are employed in it, should become acquainted with its duties at an early period of life, it must follow of course, that Congress are empowered by the Constitution to authorize the enlistment of minors. In pursuance of this authority we find, that all the Acts of Congress, upon this subject, make particular mention of the enlistment of boys. That it was the intention of Congress, that this enlistment should be effected without the previous consent of the parents, is evident from their

\*75 having inserted \* express clauses in the Acts relating to the army (in which it is to be remarked an early apprenticeship is not essential) for the purpose of protecting the rights of parents and

masters. If the construction contended for is not given to these Acts, then the provisions in them, respecting *boys*, are perfectly idle ; for surely parents and masters are not authorized by the Common Law to bind out their children, or apprentices, to a military service.

But it may be observed, that the premises assumed by the applicant, for a discharge, are not founded in fact, or, at least, do not appear in evidence.

In this case there is no evidence, that the father did dissent to the enlistment of his son ; nor is there, at this moment, any proof that the father now wishes his discharge. The writ of *habeas corpus* must be considered as sued out by the minor, and his peculiar rights and privileges are alone to be regarded.

It is conceded, that an infant is protected by the Common Law from all improvident and unnecessary contracts, but all others he is at liberty to enter into ; therefore he may contract matrimony, take the oath of allegiance, and, in short, "do all things necessary for the public good."<sup>1</sup> Throughout the whole system of our laws it appears, that beneficial contracts may be made by minors, and even where a certain class of permitted contracts has been subsequently deemed injurious, the legislature has, from time to time, been obliged to interfere and limit the powers of minors. Thus, the general right of contracting matrimony was limited in England, by the Statute of 26 Geo. II. But no such limitation has been enacted in relation to serving the public ; and, in England, minors may be compelled to serve in the navy ; nor was it until the Statutes of 2 and 3 Ann. ch. 6, § 15 ; 4 Ann. ch. 19, § 17 ; and 13 Geo. II. \* ch. 17, that they were exempted, \*76 during their apprenticeship, and then only for the term of three years.

No Court of justice ought to suffer it to be promulgated, that

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<sup>1</sup> Com. Dig. tit. *Enfant*, B, 6.

a contract to serve the public is not a beneficial contract. It is, to be sure, denied by the counsel for the minor, to be for his benefit, but is it not for the public good? Without condescending to investigate, whether the most honorable and useful of all services can be for the advantage of a minor, it is sufficient to render it obligatory, that this was entered into voluntarily, and is for the public good.

It being established on general principles, that contracts of this description may be entered into by minors, and particularly where the rights of others are not infringed; do the circumstances of this case form any peculiar exception?

Whatever might have been the power of the parent over his child in England anciently, it has been long settled, as laid down by Blackstone, "that the father may have, indeed, the benefit of his children's labor, while they live *with him* and are *maintained by him*; but this is no more than he is entitled to from his apprentices or servants."<sup>1</sup> This individual was suffered by his father to roam at large, and gain his sustenance where he could. He sent him into the world with his implied, if not his express assent to render valid any of his engagements, at least, for his support and education; it is now too late, did he interpose and withdraw this assent, to say that such engagements were invalid.

Being thus at large, the infant may certainly make contracts in relation to the disposition of his person; and if beneficial at the time, they must bind him.<sup>2</sup> It may be added, that at the Common Law, the parent had no right to dispose of the person  
 \*77 of his child; and it was not until the \* 12 Car. II. ch. 24, that he acquired the right of disposing of the custody of him by will.

The sentence of the court martial, it is contended, places this question, however, on a different ground. Assuming for the

<sup>1</sup> 1 Black. Com. 453.

<sup>2</sup> *Maddon v. White*, 2 Term R. 159.

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sake of the argument, that this contract was voidable by the minor, but by him alone,<sup>1</sup> yet he did not, during his engagement with his government, make known his intention to avoid it by any legal proceedings, or any legal act whatever. And it cannot be doubted, that to enable a party to avoid a contract with the government, some such act or proceeding is indispensable.

It appears in this case, on the contrary, that the minor, by a clandestine departure, committed a crime not only against positive law, but against his oath, which bound him to fulfil that law. He is, therefore, now held, not by virtue of his original engagement, strictly speaking, but by the sentence of a competent tribunal, in consequence of the crime that he committed. If his original contract with his country was an invalid one, he ought to have pleaded the disability which rendered it such, at the time he was arraigned. Not having then done it, he must be presumed to have waived his rights, by pleading guilty before the court-martial. It was the *gist* of his defence, that he was not legally bound to serve the United States; unless he was, he could not have been guilty of desertion. The decision, therefore, of that Court, having jurisdiction, must be conclusive upon all the world; it cannot, in this collateral manner, be investigated or reversed.

The following opinion was delivered at an adjourned meeting of the Court.

**STORY J.** The first question is, whether the contract of enlistment, supposing it to have been made without the consent of the father, is valid or not.

\* By the Common Law, the father has a right to the custody \*78 of his children during their infancy. In whatever principle this

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<sup>1</sup> *Keane v. Boycott*, 2 H. Black. R. 511.

right is founded, whether it result from the very nature of parental duties, or from that authority, which devolves upon him, by reason of the guardianship by nature, or nurture, technically speaking, its existence cannot now be brought into controversy.<sup>1</sup> This right, however, is not unlimited ; for whenever it is abused by improper conduct on the part of the parent, Courts of law will restrain him in its exercise, and even take the custody permanently from him.<sup>2</sup> By the Common Law, also, a father is entitled to the benefit of his children's labor, while they live with him, and are maintained by him ; but this (as has been justly observed) is no more than he is entitled to from his servants.<sup>3</sup>

It has also been asserted, that by the same law a father may bind his children as apprentices without their consent ; and thereby convey the permanent custody of their persons, as well as benefit of their labor, to their masters during their minority.<sup>4</sup> But, notwithstanding the aid of the very respectable authorities,<sup>5</sup> it may well be doubted, if this doctrine can be supported to the extent, in which it is laid down. The custody of minors is given to their parents for their maintenance, protection, and education ; and if a parent, overlooking all these objects, should, to answer his own mercenary views, or gratify his own unworthy passions, bind his child as an apprentice upon terms evidently injurious to  
 \*79 his interests, or to a trade, or occupation, which \* would degrade him from the rank and character, to which his condition and circumstances might fairly entitle him, it would be extremely

<sup>1</sup> *Ex parte Hopkins*, 3 P. Williams R. 151. Co. Lit. 88, and Hargrave's notes. *Rex v. De Manneville*, 5 East R. 222. *De Manneville v. De Manneville*, 10 Ves. Jr. R. 52. 1 Black. Comm. 452, 461.

<sup>2</sup> *Archer's case*, 1 Ld. Raym. R. 673. *Rex v. Smith*, 2 Str. R. 982. *Rex v. Delavel*, 3 Burr. R. 1434. *Commonwealth v. Addicks*, 5 Binn. R. 520.

<sup>3</sup> 1 Black. Comm. 453. <sup>4</sup> Com. Dig., *Justices of the Peace*, B, 55.

<sup>5</sup> *Day v. Everett*, 7 Mass. R. 145.



difficult to support the legality of such a contract.<sup>1</sup> And it would be a strong proposition to maintain, that a father might, in time of war, upon the mere footing of the Common Law, enlist his son as a common soldier in the army, or as a seaman in the navy, without his consent, and compel him to serve during the whole period of his minority, without a right to receive to his own use any of the earnings of his laborious and perilous course of life.<sup>2</sup> In such a contract, there would not even be a semblance of benefit to the minor.† It is not, however, necessary to decide these points; and they are commented on, merely in answer to some suggestions at the bar. Be the right of parents, in relation to the custody and services of their children, whatever they may, they are rights depending upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate, unless the legislative power be controlled by some constitutional prohibition.

The Constitution of the United States has delegated to Congress the power "to raise and support armies," and "to provide and maintain a navy"; and, independent of the express clause in the Constitution, this must include the power "to make all laws, which shall be necessary and proper for carrying into effect the foregoing powers." It is certain, that the services of minors may be extremely useful and important to the country, both in the army and navy. How many of our most brilliant victories \*80 have been won, on land and sea, by persons, who had scarcely passed the age of minority? In the navy, in particular, the employment of minors is almost indispensable. Nautical skill can-

<sup>1</sup> *Respublica v. Kepple*, 2 Dall. R. 197. *The King v. Inhabitants of Cromford*, 8 East R. 25.

<sup>2</sup> 10 Johns. R. 453, *Grace v. Wilbur*.

† It has been recently decided in New York, that a parent has no authority to bind his child to military service. *Grace v. Wilbur*, 10 Johns. R. 453; *S. C.*, 12 Johns. R. 68.

not be acquired, but by constant discipline and practice for years in the sea service ; and unless this be obtained in the ardor and flexibility of youth, it is rarely, at a later period, the distinguishing characteristic of a seaman. It is notorious that the officers of the navy generally enter the service as midshipmen as early as the age of puberty ; and that they can never receive promotion to a higher rank, until they have learned, by a long continuance in this station, the duties and the labors of naval warfare. And to this early discipline and experience, as much as to their gallantry and enterprise, we may proudly attribute their superiority in the contests on the ocean during the late war. It cannot, therefore, be doubted, that the power to enlist minors into the naval service is included within the powers delegated to Congress by the Constitution ; and the exercise of the power is justified by the soundest principles of national policy. And if this exercise should sometimes trench upon supposed private rights, or private convenience, it is to be enumerated among the sacrifices, which the very order of society exacts from its members in furtherance of the public welfare.

The position asserted at the bar, denying to Congress the power of enlisting minors without the consent of their parents, is not a little extraordinary. It assumes as its basis, that a granted power cannot be exercised in derogation of the principles of the Common Law ; a construction of the Constitution, which would materially impair its vital powers, and overthrow the best settled rules of interpretation. Can there be a doubt, that the state legislature can, by a new statute, declare a minor to be of full age, and capable of acting for himself at fourteen, instead of twenty-  
 \*81 one \* years of age ? Can it not emancipate the child altogether from the control of its parents ? It has already, in the case of paupers, taken the custody from the parents, and enabled the overseers of the poor to bind out the children as apprentices, or

servants, during their minority, without consulting the wishes of the parents.<sup>1</sup>

It has, without the consent of parents, obliged minors to be enrolled in the militia, and to perform military duties; and although these duties are, in time of peace, but a slight interference with the supposed rights of parents; yet they may, in time of war, expose minors to the constant perils and labors of regular soldiers, and altogether deprive their parents of any control over their persons or services. In time of war, too, the state may, for its defence, establish and maintain an army and navy; and it would be a strange and startling doctrine, that the whole youth of the state might, unless the consent of their parents could be previously obtained, be withheld from the public service, whatever might be the pressure of the public dangers or necessities. And if the State Legislature could, in their discretion, abrogate or limit the paternal authority, it must be for precisely the same reasons, that the national legislature could do it, viz. that it is necessary, or proper, to carry into effect some other granted powers.

It has been justly observed, in a work of the very best authority,<sup>2</sup> that no maxim is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized. Whenever a general power to do a thing is given, every particular power necessary for doing it is included. And I feel no scruple in affirming, that Congress, having authority "to provide and maintain a navy," may constitutionally authorize the enlistment into the naval service of any minors, independent of the private \* consent of their parents; and that the \*32 statutes passed for this purpose are, emphatically, the supreme law of the land. Nor is the exercise of this power novel in the institutions of that country, from which we have borrowed

<sup>1</sup> Act of 26th Feb. 1794, § 4.

<sup>2</sup>The Federalist, No. 44.

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most of the principles, which regulate our civil and political rights. It has even been pushed to an extent, which is not only odious, but has become, in a great degree, subversive of the personal liberty of a large class of meritorious subjects. Minors may not only be enlisted into the British navy without the consent of their parents; but they may be forcibly impressed into it against the joint will of their parents and themselves. And even apprentices, regularly bound by contract, are not, except in special cases, and for a limited time prescribed by statute, exempted from the like impressment.<sup>1</sup>

Much has been stated in the argument, in reference to what contracts of infants are void, and what are voidable at the Common Law. There is in the books considerable confusion on this subject, which has not been entirely removed by the learned discussions in *Zouch v. Parsons*.<sup>2</sup> The distinctions laid down in another case by Lord Chief Justice *Eyre*, seem founded in solid reason, viz. that where the Court can pronounce, that the contract is for the benefit of the infant, as for instance, for necessities, there it shall bind him; when it can pronounce it to be to his prejudice, it is void; and that where it is of an uncertain nature, as to benefit or prejudice, it is voidable only; and it is in the election of the infant to affirm it or not.<sup>3</sup> It is a material consideration also, that the

\*83 validity of the infant's act, or \*contract, is, in point of law, independent of the right of custody in his parent, although this may be an ingredient in ascertaining in point of fact, whether the act, or contract, be for his benefit or not. In short, the

<sup>1</sup> *The King v. Reynolds*, 6 T. R. 447. *The King v. Edwards*, 7 T. R. 745. *Ex parte Softly*, 1 East R. 466. *Ex parte Broke*, 6 East R. 238. Stat. 13 Geo. 2, ch. 17.

<sup>2</sup> 3 Burr. 1794, and see *Burgess v. Merrill*, 4 Taunt. 468.

<sup>3</sup> *Keane v. Boycott*, 2 H. Bl. 511. *The King v. Shinfield*, 14 East R. 541.

disabilities of an infant are intended by law for his own protection, and not for the protection of the rights of third persons; and his acts may, therefore, in many cases, be binding upon him, although the persons, under whose guardianship, natural or positive he then is, do not assent to them. The privilege, too, of avoiding his acts or contracts, where they are voidable, is a privilege personal to the infant, and which no one can exercise for him.<sup>1</sup> And whenever any disability, enacted by the Common Law, is removed by the enactment of a statute, the competency of the infant to do all acts within the purview of such statute, is as complete as that of a person of full age. And whenever a statute has authorized a contract for the public service, which, from its nature or objects, is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed to be for their benefit, and for the public benefit; so that when *bonâ fide* made, it is neither void nor voidable, but is strictly obligatory upon them. I say *bonâ fide* made, for if there be fraud, circumvention, or undue advantage taken of the infant's age, or situation, by the public agents, the contract could not, in reason or justice, be enforced. It would be strange, indeed, if Courts of Law could judicially hold contracts to be void, or voidable, which the Legislature should deem salutary or essential to the public interests; or pronounce them invalid, because entered into by the very parties, who were within the contemplation of the law.

From these more general considerations, we may now pass to the question, whether the laws of the United States \* authorize \*84 the enlistment of minors into the navy, without the consent of their fathers. All the Acts, from the first establishment of the navy, authorize the employment of midshipmen (who are invariably minors, when they enter the service) and all

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<sup>1</sup> *Keane v. Boycott*, 2 H. Bl. 511.

the Acts since the Statute of 30th June, 1798, ch. 81, including those now in force, and under which the present applicant has been enlisted and held in service in express terms authorize the President to engage and employ "boys" in the ordinary duties of the navy. In no one of them is there any provision requiring the consent of parents or guardians to their engagement, or authorizing them to make it.<sup>1</sup> The laws manifestly contemplate, that it is a personal contract made by the infants themselves for their own benefit. They are entitled to the pay, the bounties, and the prize-money earned and acquired in the service. This is not denied in the argument. And if the laws be so, then they must, by necessary implication, give a capacity to the infants to make such a contract; and when made, assert its legal validity.

Upon any other supposition, the whole object of the Legislature would be defeated; for if the contract of the infant, made without the assent of his parent, were void, or voidable, that assent would not, by the mere operation of the Common Law, change its character. A contract voidable by the Common Law, cannot be confirmed or avoided by any assent or dissent of the parent thereto. It is binding, or not, solely at the election of the infant himself. And if the contract be avoid, it is incapable of being set up by any person. To suppose, that the Legislature meant to authorize an infant to enlist in the navy and yet that the contract should be voidable at his election, would be to suppose, that it meant to repeal the rules and articles of \*85 \*the navy in his favor, and enable him to desert, when his services were most important to the public.

If, indeed, the Acts of Congress had authorized parents or guardians to bind their minor children to an apprenticeship or

<sup>1</sup> See Acts of 30th June, 1798, ch. 81. 21st April, 1806, ch. 35. 3d March, 1807, ch. 35. 31st January, 1809, ch. 78. 2d January, 1813, ch. 148.

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servitude in the navy, a valid contract might then have been made by such parents or guardians. But there is no such authority in the Acts, nor am I satisfied, that it ever existed at the Common Law ; and if it ever did, the Statute of Massachusetts of the 28th of February, 1795, ch. 64th, seems to have restrained the exercise of that power to the cases and manner specified in that Statute. A different doctrine has indeed been held ; but it seems to me extremely difficult to be maintained,<sup>1</sup> and, in a case depending upon similar principles of construction, the opposite doctrine has been established in another Court.<sup>2</sup>

Upon the whole, as Congress have authorized "boys" to be engaged in the service of the navy, without requiring the previous consent of their parents to the contract of enlistment, that contract, when fairly made with an infant of reasonable discretion, must be deemed to have a semblance of benefit to him, and to be essential to the public welfare, and, therefore, binding to all intents and purposes. And if it were not so binding, but were voidable, even the consent of parents would not infuse into it any farther validity.

This construction of the Acts respecting the naval establishment, is confirmed by the general practice in that department, and by the consideration, that in the Acts respecting enlistments in the army, a proviso was for a long time inserted, "that no person, under the age of twenty-one years, shall be enlisted by any officer, or held in the service of the United States without the consent of his \*parent, guardian, or master, \*86 first had and obtained, if any he have."<sup>3</sup> And at length the necessities of the public service were such, that the enlistment

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<sup>1</sup> *Day v. Everett*, 7 Mass. R. 145.

<sup>2</sup> *Ex parte M'Dowle*, 8 Johns. R. 328.

<sup>3</sup> See Act of 11th March, 1802, ch. 9. 11th January, 1812, ch. 14. 20th January, 1813, ch. 154. By the Acts of 1812 and 1813, this contract must be in *writing*.

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of minors, over eighteen years of age, into the regular army, was expressly authorized. And the proviso of the Act of the 20th of January, 1813, ch. 154, which required the previous consent of their parents, guardians, or masters, was expressly repealed by the Act of 10th of December, 1814, ch. 10. This course of legislation manifestly shows, that whenever the rights of parents were intended to be saved, a special proviso was uniformly introduced for that purpose.

The decisions of two very respectable State Courts, which have been cited at the bar, so far as they go, proceed on the same principles, which have been adopted by this Court, and are entitled to great weight.<sup>1</sup> The decisions of our own State Court, which have been cited on the other side, are inapplicable; for they turn altogether upon the meaning and extent of the proviso in the Army Act of 1813, ch. 154. It is not now necessary to consider, how far a State Court has jurisdiction to discharge a person, who, by the return of the *habeas corpus* is shown to be enlisted under a contract with the United States. Whenever that question shall arise, it will deserve very grave consideration.<sup>2</sup> But, with great deference to the learned Judges, I have never been able to bring my mind to assent to the construction put upon the Act of 1813, in some of the cases in the Massachusetts Reports.<sup>3</sup>

\*87 \* The view, which has been taken upon the general question, as to the validity of the contract of enlistment, renders it unnecessary to consider the second point made in this cause, viz. how far an infant can, by disaffirming his contract of service, avoid the punishment, which has been regularly adjudged against him

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<sup>1</sup> *Commonwealth v. Murray*, 4 Binney's R. 487. *Ex parte Emanuel Roberts*, 2 Hall's Amer. Law Journal, 192.

<sup>2</sup> See *Ex parte Roberts*, 2 Hall's Law Jour. 192. *Ferguson's case*, 9 Johns. R. 239. *Martin v. Hunter*, 1 Wheaton's R. 304.

<sup>3</sup> *Commonwealth v. Cushing*, 11 Mass. R. 67.



by the sentence of a court-martial, for a crime committed by him, the whole proceedings and sentence having been pronounced, while the contract was in force.<sup>1</sup>

If it had been necessary in this case to ascertain, whether there had been any consent of the father, I should have thought it necessary to have required more explicit affidavits than have been made, and a peremptory denial of assent on the part of the father, as well as a special statement of the facts, as to the mode of life and place of residence of the minor previous to his enlistment; for an assent of the father need not be express, but may be implied from circumstances. If a father should voluntarily send his minor children away from home, to obtain a maintenance and support in any manner, that they could; this would be an implied consent to any contract for that purpose, into which they should enter, and a waiver of his parental rights. It is upon this ground, that the ordinary retainers of servants, who are minors, are held valid against the subsequent acts of the father.

In strictness of law the contract of the minor in such cases becomes obligatory, because, being exile from his father's house, whatever contract he forms is, in an enlarged view, necessary for his support, maintenance, or education.

I am of opinion, that Robert Treadwell, the minor, ought to be remanded to the custody of his commanding officer. \*It is \*88 the opinion of the District Judge, that the consent of the parent, or guardian, when there is one, is necessary, either expressed or implied, to authorize the engagement of a minor in the naval service; but he concurs in the order to remand the said Robert to the custody of his commanding officer on the special circumstances of this case.

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<sup>1</sup> See *Rex v. St. Nicholas*, Burr. sett. cas. 41. 2 Str. R. 1066. *Gray v. Cookson*, 16 East R. 13. *Grace v. Wilbur*, 10 Johns. R. 453. *S. C.*, 12 Johns. R. 68.

## THE BRIG GEFLA, WILTE MASTER.

If a claim be interposed by the United States in a prize proceeding upon a seizure for a forfeiture under the non-importation Acts, and the title of the captors and the claimants be defeated; the property will be condemned to the United States, subject to distribution according to the provisions of the Act of 2d March, 1799, ch. 128, § 91.

THIS was an allegation of prize against the brig Gefla and cargo, upon an asserted capture by the privateer Mary, Pritchard commander. At the trial in the District Court of Maine, a claim was interposed by the United States claiming the vessel and cargo as forfeited for a violation of the Importation Act of the 1st of March, 1809, ch. 91, as revised and enforced by the Act of 1st of May, 1810, ch. 56, and the Act of 2d March, 1811, ch. 96. The claim alleged, that the goods, being prohibited goods, were taken on board in August, 1813, at Bermuda, a colony or dependency of Great Britain with the knowledge of the master, and with intent to import them into the United States; and that afterwards on the 16th of November, 1813, the brig with the same goods arrived within the waters of the United States and the district of Portland and Falmouth; and after her arrival was, on the same day, captured in said district by the privateer Mary; \*89 and was afterwards, on \* the same day, seized, as forfeited, by the collector of said district.

At the hearing, the vessel and cargo were condemned to the United States; and from this decree an appeal was interposed to the Circuit Court of Massachusetts; but the appeal was afterwards abandoned, and, at the October Term, 1814, the decree of the Court below was, by the consent of parties, affirmed, reserving the question of distribution.

And now at this term *G. Blake*, for the United States, and for the collector of said district, prayed for a decree of distribu-

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The *Gefa*.

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tion, as in case of a proceeding upon a mere seizure for a municipal forfeiture.

**STORY J.** The question as to the distribution of the forfeiture was reserved, not from any doubt entertained by the Court, but from an expectation that the same question would be finally settled by the Supreme Court in the cases of the *Janstoffs* and *Bothnea*. It is now uncertain, however, whether the point will be decided in either of those cases. If this were an information *in rem* for the alleged breach of the non-importation Act, it is clear, that the property forfeited must be distributed according to the 91st section of the Collection Act of the 2d of March, 1799, ch. 128. The question is, whether the right of the collector and other officers of the Customs to a distributive share is ousted by the forfeiture being asserted by way of claim in a prize proceeding, instead of an original suit. When property is libelled as prize, the United States cannot seize it, as forfeited under a municipal law, so as thereby to defeat the prize jurisdiction. The only proper mode of proceeding is to interpose a claim in the prize Court upon a seizure for the forfeiture; and this claim is in the nature of an information. If upon the hearing, the title of prize is defeated, and the claim of the owners of the property is rejected on account of any illegal conduct, \*condemnation \*90 must be to the United States. But whether the forfeiture shall be to the United States generally, or to the United States to be distributed, depends not at all upon the mode of proceeding, but upon the fact, whether there be seizing officers or others, who in the given case have entitled themselves to share in the forfeiture. Cases may arise, in which the forfeiture will wholly accrue to the government, as in the *Walsingham Packet*,<sup>1</sup> and the claim of *Lenox* and *Maitland* in the *Venus*.<sup>2</sup> But in those cases no

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<sup>1</sup> 2 Rob. R. 77.

<sup>2</sup> 8 Cranch R. 253.

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The Ulpiano.

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seizure had been made by any officer entitled to share in the forfeiture; and the proceeding was on the part of the government only to vindicate its own rights.

In the present case a seizure was made by the officers of the Customs for a breach of the non-importation Acts; and it is admitted by all parties, that the facts completely sustain the seizure. It is also admitted, that neither the captors nor the claimants have any legal title, upon which they can stand before the Court. The rights, therefore, acquired by the seizure remain untouched by any adverse claim; and although the forfeiture be inflicted in a prize proceeding; yet the Court are as much bound to recognise the rights so acquired, as if the cause were before us upon an information on the instance side of the Court.

A decree must be entered, that the proceeds of the vessel and cargo be distributed between the United States and the officers of the Customs according to the provisions of the 91st section of the Act of 2d March, 1799, ch. 128.

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## THE ULPIANO, JOHN WHITE MASTER.

Damages decreed for the amount of goods taken out of a prize captured after the treaty of peace of 1815. Costs, when allowed in prize causes.

**T**HE Ulpiano was captured by the private armed ship Blakeley, Williams commander, after the time had expired, within which captures could lawfully be made by the treaty of peace between Great Britain and the United States. The vessel and cargo had been restored by a decree of the District Court, and the sole remaining question was as to the damages to be allowed for sundry articles of merchandise, and ship stores, and furniture, alleged to have been taken from the Ulpiano, at the time of the

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The *Ulpiano*.

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capture by the captors. A decree was rendered by the District Court for \$ 625 damages, and costs of suit ; from which decree, the captors appealed to the Circuit Court.

The cause was argued by *Welsh* for the captors, and *Hall* for the claimant.

**STORY J.** The evidence in this case is extremely contradictory, both as to the value and as to the quantity of the goods taken from the *Ulpiano*. There is a disposition manifested, on the part of the claimant, to inflate the amount in both respects. And this exaggeration unavoidably lessens the confidence, which the Court would otherwise incline to place in the statements of the master of the prize. There is no pretence, that the captors have acted unreasonably, or with ill faith ; and it is very properly conceded, that the claimant is entitled to nothing more than a just compensation for the loss of the goods, which have been consumed or destroyed by the captors. This compensation, it is the duty, as well as the inclination of the Court to allow to the utmost extent of loss, which \*the evidence will reasonably warrant. \*92 But it is a material consideration, that in this inquiry the *onus probandi* rests on the claimant ; and, if the evidence on his part be lax, infirm, and unsatisfactory, he cannot complain, that the Court arrives at its conclusion by the application of this general principle, rather than embarrasses itself with doubts and conjectures.

I am not satisfied, that the claim for fifty fathoms of rope, and sixty fathoms of cable, is sustained by the evidence ; and the quantity of wine and brandy, and the number of hides and poultry admitted in the evidence of the captors to have been taken from the prize, seem to me to approach much nearer to the truth, than in the inflated accounts of the claimant. As to the residue of the items, it cannot be necessary to examine them in

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The Ulpiano.

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detail ; and, making the most liberal allowance in relation to them, after the deductions from the claim already specified, the sum of four hundred dollars will be a full compensation for the loss, as it stands in proof before the Court ; and to that extent, I shall pronounce a decree in favor of the claimant. As to costs, the allowance or denial of them rests in the discretion of the Court ; but I do not think, that there is any solid reason, why they should be denied in this case. The capture, though made in good faith, must in point of law be deemed a *tortious act* ; and as the party had a just claim for restoration of the goods, or their value, which has never been admitted by the captors, nor compensation tendered therefor, he is entitled, by the general practice of the Court, to such costs as have necessarily arisen in the prosecution of his claim ; and he has not been guilty of such misconduct, as amounts to a forfeiture of such costs. Costs must, therefore, be decreed.

# CIRCUIT COURT OF THE UNITED STATES.

## Fall Circuit.

NEW HAMPSHIRE, OCTOBER TERM, 1816, AT EXETER.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN S. SHERBURNE, District Judge.

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### RICHARD CROWNINSHIELD v. DAVID ROBINSON AND OTHERS.

In an action for damages for negligence in keeping the plaintiff's sheep, founded on the breach of a special contract, the defendant will not be permitted to deduct from the damages the compensation, which he claims for keeping the sheep. Such compensation, if any be due, must be sought in a distinct action.

**ASSUMPSIT** upon a special written contract for keeping 100 sheep of the plaintiff for one year, at a stipulated price. The breach alleged, that by reason of the negligence of the defendants, &c. the sheep were greatly injured, and some died.

The cause was tried upon the general issue, and, at the trial, the principal controversy was, as to the facts. *Mason*, of counsel for the defendants, however, contended, that if the jury should be satisfied, that the plaintiff was entitled to damages, they ought to deduct from such damages the amount, which, under a *quantum meruit*, or by the stipulations of the contract, the defendants would be entitled to recover for the keeping of the sheep; and if this sum was equal to the damages sustained, they ought to return a verdict for the defendants. He further stated, that an action was now pending in the State Court by the defendants against the plaintiff, founded on such *quantum meruit*.

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\* *Sullivan*, for the plaintiff, on the other hand contended, that the jury were bound to give the full damages, without any reference to any supposed right of the defendants to be asserted under the *quantum meruit* for the keeping of the sheep.

*The Court.* We are fully aware of the opinions, which have been entertained in the English Courts upon this subject, and of the strong leaning of the later authorities in favor of the doctrine of the defendant's Counsel. But, in our judgment, the true rule under the circumstances of this case is, to estimate the full value of the plaintiff's damages, without taking into the account the possible claims of the defendants for the keeping of the sheep. If the defendants are entitled to any thing for the keeping, they may recover it in another form of action, to the extent, to which they can show a performance of their contract, and a benefit derived by the plaintiff. A recovery in this action would be no necessary bar to such a suit; and, therefore, the plaintiff might be doubly charged, if the deduction were now made. Besides; if the defendants were entitled to a meritorious compensation, equal to the injury sustained by the plaintiff, then, upon the ground stated, notwithstanding such injury, the verdict of the jury ought to be, that the defendants are not guilty, which would throw the costs of the suit upon the plaintiff. And, certainly, in that event, a judgment for the defendants in this action would be no bar to an action on a *quantum meruit* for keeping the sheep; for it never could judicially appear, that the former verdict was given upon this special ground, and not upon the ground, that the plaintiff had sustained no injury. The verdict would affirm nothing, but a general finding in favor of the defendants; and the private grounds, upon which the jury proceeded, could never be a fit subject of inquiry, even supposing, what might well be doubted, that they were all agreed on the same grounds.



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\* After a good deal of reflection on the subject, we think it safest, though the point is certainly not free from difficulty, to adhere to the old doctrine, and to confine the later doctrine to such cases only, where it is incontestable, that the parties cannot be prejudiced. It is at most an equitable offset, which ought not to be admitted, when it may work against equity. The case might have admitted of a very different consideration, if the present defendants had brought an action upon the contract for compensation for keeping the sheep; for, to such an action, gross negligence and injury would be a complete defence, since they would establish the fact of a non-performance of the contract, according to the express engagement of the defendants. And even on a *quantum meruit*, such negligence or injury might, under circumstances, constitute a bar to the action, or be proper evidence to reduce the amount of the compensation.<sup>1</sup>

*Verdict for the plaintiff.*

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<sup>1</sup> Upon this point see *Boston v. Butler*, 7 East R. 479. *Templar v. McLachlan*, 5 Bos. & Pull. R. 136. *Farnsworth v. Garrard*, 1 Camp. R. 38. *Fisher v. Samada*, 1 Camp. R. 190. *Bilbee v. Lumley*, 2 East R. 469. *Kist v. Atkinson*, 2 Camp. R. 63. *Morgan v. Richardson*, cited in 3 Smith R. 486, and in 1 Camp. R. 40, note. *Denew v. Daverell*, 3 Camp. R. 451. *Sheels v. Davies*, 4 Camp. R. 119. *Akell v. Smith*, 1 Stark. R. 107.

# CIRCUIT COURT OF THE UNITED STATES.

## Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1816, AT BOSTON.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN DAVIS, District Judge.

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JOHN C. BURKE v. SAMUEL R. TREVITT.

The District Court, as a Court of Admiralty and maritime jurisdiction, may entertain suits for all torts, damages, and unlawful seizures at sea ; and as a Court of revenue, it may entertain suits for the trial of property seized for violations of municipal laws ; and, as incident to this jurisdiction, may compel a redelivery of the property, and award damages for any loss of, or injury to it. It may compel a seisor to proceed to adjudication, in the same manner as it does a captor. After process served in proceedings *in rem*, the thing is deemed in the custody of the Court, though in the actual possession of the collector, &c. under the Act of 1799. The officers of the Court, who have the custody of property seized, pending the suit, are responsible for any loss or injury sustained by want of due diligence. If an officer of the revenue seize goods without probable cause, he is responsible for all losses and injuries, however occasioned. If with probable cause, he is responsible only for losses and injuries occasioned by ordinary neglect.

**T**HIS was a libel for restitution of goods, belonging to the plaintiff, which were alleged to be seized by Captain Trevitt, the commander of the Revenue Cutter, on board the schooner *Urania*, of which the plaintiff was mate, as forfeited by law, but against which no proceedings had been instituted on the revenue side of the District Court. The defendant filed a defensive allegation, denying all the charges alleged in the libel, and asserting, that the schooner *Urania* and her cargo, after seizure, were duly brought into the port of Boston, without any loss or subtraction,

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and \* the vessel libelled in the District Court, and duly taken possession of by the Marshal of the District, and the defendant, and his servants, and keepers there, discharged from the possession and custody, as well of the said vessel as of her cargo. The libel was thereupon agreed to be amended, and the Marshal was made a party to the suit, and he pleaded a defensive allegation, admitting that he had taken the possession and custody of the vessel, under a warrant from the Court, but denying, that the said goods were ever in his custody or possession.

Upon the hearing of the cause it appeared, that the *Urania* was, about the 18th of July, 1815, seized by Captain Trevitt, on the coast of the District of Maine, for a supposed breach of the revenue laws, and was, together with her cargo, brought to Boston for trial. The plaintiff was mate of the *Urania*, at the time of the seizure; and the goods in question, viz. four kegs of tobacco and four thousand cigars were his adventure. At the time of the seizure, the plaintiff asked for his adventure; and Captain Trevitt told him, if he would help work the vessel to Boston, he should have it. He accordingly came to Boston in the vessel, and remained on board until after the vessel was libelled. A suit was duly instituted, in the District Court, against the vessel only; and, when the Marshal came to execute the process, he took possession of the vessel, put a ship-keeper on board, and ordered all the crew of the Revenue Cutter, then on board, to go ashore. The plaintiff then asked the Marshal to deliver him his adventure, to which he replied, that he could not tell any thing about it. The cargo, not being libelled, was restored, and the vessel was, after trial, acquitted. At the time of the restoration of the cargo the tobacco could not be found; and there was evidence tending to show, that the vessel had been broken open in the night-time, and that the ship-keeper was, from his ill health, unable to bestow a proper \* degree of watchfulness over \*98 the ship, and also to prove, that the plaintiff had endeavoured

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to seduce a boy under the ship-keeper, to purloin some of the rigging and appurtenances of the schooner while in his custody. There was no evidence, that the defendant refused to give up the plaintiff's adventure, after the arrival at Boston, or that he was even deprived of the custody of it; and the loss, if any, occurred after the vessel was taken possession of under the process of the District Court.

*Peabody*, for the appellant, argued, that as there could be no doubt, that the property was on board, the only question was, whether the appellant, in consequence of his negligence, had discharged all other persons from responsibility. That it being the duty of captors to libel immediately, and proceed to adjudication, the appellant could have nothing to do with the property, until such proceedings were had, and, therefore, could not be chargeable with negligence respecting it. What then was the degree of care, for the want of which, an officer in such a case was responsible?

STORY J. observed, that he understood captors to be answerable for fair and reasonable diligence.

*Peabody* assented to this, and added, that had these goods been liable to seizure, then this doctrine would have applied; but that they never were liable to seizure. Had they been so, then the inquiry would remain, whether, under the circumstances, Trevitt was not liable for them, as not having kept them diligently.<sup>1</sup>

*Smith*, on the other side, raised some question as to the jurisdiction of the District Court in a case of this nature; \* and fur-

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<sup>1</sup> 5 Rob. R. 357, (Eng. edit.)

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ther contended, that the captain of the Revenue Cutter was only an agent of the collector, and that, therefore, the action should have been brought against the collector, if against any body.<sup>1</sup> That the Marshal could not be liable, because he only took charge of the vessel and her appurtenances; and that if the property was ever in his possession, it was by accident alone, and he would be liable only for gross negligence.<sup>2</sup>

STORY J. A doubt was thrown out at the argument, whether cases of this description were within the jurisdiction of the District Court. The proceeding is, to be sure, of rare occurrence, because there has seldom been an occasion requiring its exercise; but it is difficult to conceive the ground of the doubt suggested at the bar. The District Court, as a court of admiralty and maritime jurisdiction, may entertain suits for all *torts*, damages, and unlawful seizures, committed upon the high seas, and other navigable waters, where the tide ebbs and flows. As a court of revenue, it has exclusive jurisdiction of all seizures made under laws of impost, navigation, or trade of the United States, and may entertain suits for the condemnation or acquittal of the property so seized; and, as an incident to such jurisdiction, may compel a redelivery of the property, or its value, into the possession of those, who may be ultimately entitled to it.† And it is quite immaterial, whether such a proceeding be enforced by way of original suit, or by a summary decretal order, in a cause already before the Court. Cases are familiar, where the Court proceeds by way of monition, to compel captors to proceed to adjudication of their prizes, and, on their refusal, enforces the rights of the claimant by a summary, or \* plenary proceeding, as the circum- \*100

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<sup>1</sup> 1 U. S. Laws, 236 - 240.

<sup>2</sup> Jones on Bailments, 32.

† The same point has been since recognised in *Slocum v. Mayberry*, 2 Wheat. R. 1, and see *Gelston v. Hoyt*, 3 Wheat. R. 302, &c.

stances of the case may require. If the same process to compel a seizer to proceed to adjudication of property, seized for breaches of the municipal laws, is less familiar, it is not, that the Court has entertained doubts of its authority ; but that its interposition has not been sought. When property is seized, as forfeited under the revenue laws, it is the duty of the seizing officers immediately to institute the proper process to ascertain the forfeiture ; and this duty is enforced by the eighty-ninth section of the Collection Act.<sup>1</sup> As soon as the process is commenced, the property is in the custody of the law ; for it is a general rule in all proceedings *in rem*, that the custody of the thing in controversy belongs to the Court, in which the suit is pending.<sup>2</sup> The Act of the 8th of May, 1792, ch. 36, § 4, directed, that the Marshal should have the custody of all vessels and goods seized by the revenue officers ; but this provision was altered, as to goods, by the Collection Act of March 2d, 1799, ch. 128, § 69, which declared, that all goods seized under that Act, should be put into and remain in the custody of the collector or his agent. This Act, however, does not change the legal custody, after process is served upon the property. It is still, in contemplation of law, in the custody of the Court ; and the collector remains as much responsible to the Court for the property, and as much bound to obey its decrees and orders, as the Marshal is, as to property confided to his care. The collector is in fact *quoad hoc* the mere official keeper for the Court.<sup>3</sup> In respect to property in the custody of officers of the Court, pending process, they are undoubtedly responsible for good faith and \*101 \* reasonable diligence. If the property be lost or injured by a

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<sup>1</sup> Act 2d March, 1799, ch. 128.

<sup>2</sup> *Jennings v. Carson*, 4 Cranch R. 2. *Home v. Camden*, 2 H. Bl. 533. *The Maria and Vrow Johanna*, 4 Rob. R. 348. Sir W. Scott's argument in *Smart v. Wolff*, 3 T. R. 329. *The Rendsberg*, 6 Rob. R. 142.

<sup>3</sup> See *Smart v. Wolff*, 3 T. R. 323.

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negligent or dishonest execution of their trust, they are liable in damages; but they are not of course liable, because an embezzlement or theft is proved. They must be affected with culpable negligence, or fraud, and such is the confidence the Court places in its officers, that perhaps the proof of such negligence, or fraud, ought to be thrown upon the other party.<sup>1</sup>

What degree of diligence may be properly required in public trusts of this nature, whether that diligence, which a prudent and discreet man uses about his own affairs, and the omission of which is deemed ordinary negligence; or whether responsibility only attaches to fraud or gross negligence, the *dolus et negligentia dolo proxima* † of the Civil Law, it is not necessary to determine; for it is perfectly clear from the whole evidence, that the Marshal never claimed to have any custody of the goods in question. We may, therefore, dismiss all farther consideration of this case, so far as it respects the Marshal.

As to seizures for breaches of municipal law, they are made by officers of the customs and others at their own peril. If made without probable cause, the seizor is responsible for all consequences; for the act is construed a *tortious* act; and his diligence in the preservation of the property is no protection against losses occasioned by superior force, or inevitable casualty. If made with probable cause, the seizor, at least by the laws of the United States,<sup>2</sup> is entitled to the benefit of a *bonæ fidei* possession,\* and is responsible only for ordinary diligence in the preservation of the property, and in bringing it in for adjudication.‡

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<sup>1</sup> *The Hoop*, 4 Rob. R. 145. *The Rendsberg*, 6 Rob. R. 142, 157, 169.

† See *The Rendsberg*, 6 Rob. R. 142, 157, 169. Domat, B. 1, tit. 7, observ. prelim. Pothier, Traité du Contract de Depot, ch. 4, art. 1, note 85, &c., art. 2, note 91, *et seq.*

<sup>2</sup> Act 2d March, 1799, ch. 128, § 89. Act 24th Feb. 1807, ch. 64.

‡ Whether, independently of any statutable provision, an officer, seizing for a breach of municipal law, is, in case of an acquittal, protected

In these respects, he stands upon the same footing with captors exerting the rights of prize. The rule, as to captors, is laid down by Sir William Scott, with equal brevity and precision :— “Captors are generally bound for two things, for safe and fair custody, and, if the property is lost, or destroyed, for want of that safe and fair custody, they are responsible for the loss. For these two things every captor is answerable; but if an accident or mere casualty happens, against which no fair exertion of human diligence could protect, it must fall on the party, to whom the property is ultimately adjudged.”<sup>1</sup> And, what that safe and fair custody is, the same eminent judge has stated to be, that the goods are to be kept with the same caution with which a prudent person would keep his own property.<sup>2</sup>

If in the present case the loss had occurred by theft, while the property was in the possession of the seizing officer, a question of some nicety would have arisen. It is said, that by the general law of bailments, robbery by force is considered irresistible; but a loss by private stealth is presumptive evidence of ordinary neglect.<sup>3</sup> However this may be, it is certain that the presumption may be removed by proof of due diligence.<sup>4</sup> And in the

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from damages by probable cause, has not been settled in the Courts of the United States. Is there any distinction, as to the cases of seizure on the high seas and on land? See on this subject, *Murray v. The Charming Betsey*, 2 Cranch R. 64. *Little v. Barreme*, 2 Cranch R. 170. *The Sally*, 2 Rob. R. 244. *Imlay v. Sands*, 1 Caines R. 566. *The Maria and Vrow Johanna*, 4 Rob. R. 348. *Maley v. Shattuck*, 4 Cranch R. 458, and the very recent case of *Hoyt v. Gelston*, 3 Wheat. R. 301, &c. [But see *The Apollon*, 9 Wheat. R. 362. *The Marianna Flora*, 11 Wheat. R. 1. *The Palmyra*, 12 Wheat. R. 17.]

<sup>1</sup> *The Catharine and Anne*, 4 Rob. R. 39.

<sup>2</sup> *The Maria and Vrow Johanna*, 4 Rob. R. 348. Jones on Bailments, 118.

<sup>3</sup> Jones on Bailments, 44, and *ibid.* note 18. *Ibid.* 76, 119.

<sup>4</sup> *Ibid.* 66.



Admiralty a captor is not held responsible for theft, unless there lies against him the imputation of personal negligence.<sup>1</sup> And, at all events, the seizing officer is not responsible for a loss, happening to the goods, whilst they are under the custody of the law, and removed from his possession to that of the Court.<sup>2</sup> It is not necessary, however, to pursue these considerations farther; nor would they have been brought so far into discussion, if they had not affected the daily practice of the Court. It is fit, that seizing officers, and the officers of the Court, should constantly bear in mind the nature and extent of their duties, and the degree of responsibility and diligence, which the Court requires at their hands. It is fit, also, that the public should know, that for every loss, occasioned by the misconduct or negligence of such officers, an adequate remedy will be administered by the Court in the exercise of its ordinary jurisdiction.

Upon examining the particular circumstances of the present case, there does not seem any proper ground laid for the interposition of the Court. It is not clearly shown, that the property of the plaintiff was ever seized for a forfeiture, or removed from his personal custody by the officers of the cutter. On the contrary, it is in evidence that he was told, that he should have it, when he arrived in Boston; and there is not the slightest proof, that it was ever out of his personal possession, or any control exercised over it by the revenue officers. There is great reason to suppose it was stolen, but stolen after the revenue officers had left the vessel, and the Marshal had taken possession of her under a warrant of the Court, without, however, \* claiming any right to \*104 the goods. The plaintiff has, probably, acted under a mistake; but it is a mistake, which ought not to be pressed to the injury of those, who were not parties to it.

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<sup>1</sup> *The Maria and Frow Johanna*, 4 Rob. R. 348.

<sup>2</sup> *Ibid*, 348.

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The decree of the District Court, dismissing the libel, must be affirmed ; but, under the circumstances, without costs to either party.

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ELIJAH SPURR AND OTHERS, LIBELLANTS, v. CHARLES PEARSON.

When an embezzlement takes place on board of a ship, the seamen are not liable to contribute out of their wages, unless it was caused by their fraud, connivance, or negligence ; or, if the offender is unknown, unless a presumption of guilt is fixed upon all the crew, or at least on those, who are called upon to contribute.

One seaman may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the suit.

**T**HIS was an allegation for mariners' wages. The libellants in February, 1816, shipped for a voyage in the ship *Augusta*, commanded by the respondent, from New Orleans to Havre de Grace, and from thence to Boston ; and afterwards served on board the ship during the voyage. There was no dispute as to the sum due for wages ; but the defence turned altogether upon the right of the master to retain their wages by way of contribution for an embezzlement, alleged to have been made by the crew during the voyage. It appeared in evidence that one trunk, and one case of goods of the value of \$717, which were taken on board on freight at Havre were missing on unlading the cargo at Boston ; but the loss was not ascertained until about ten days after the ship's arrival there.

These goods were taken on board a day or two before sailing from Havre, and were stowed in the fore part of the ship, and \*105 secured, in the usual manner, by a strong partition \*or bulk-head, to prevent the crew from getting at them. Orders were repeatedly given by the mate not to have the bulk-head removed, without notice to, or direction from, him. The cook, Paterson,

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however, a day or two before sailing, and after the trunks were stowed, removed the bulk-head without any notice or direction for this purpose, under the pretence that it was more convenient to get wood in this way, than in any other. At the time, the ship lay in an enclosed dock, and there were three laborers from the shore to assist in the ship's work, during the whole day before she sailed ; but they left the ship at supper-time. The officers of the ship did not know of the bulk-head being removed until the next morning. The trunks were so heavy, that they could not easily be removed without the assistance of two men ; nor without so much noise, as must awaken the crew, who were sleeping in the fore-castle, if done during the night. During the homeward voyage some *bonnet trimmings*, and some *chenille cord*, were seen in the possession of Charles Bush, one of the libellants ; and some *chenille cord* and a *pair of gloves*, in that of James Hamilton, another of the crew. These goods were of a description, as it was alleged, similar to those stolen. Both Hamilton and Bush were in the watch, having care of the ship the night before the departure from Havre. It was not proved that any of the libellants, except so far as the preceding evidence implicated them, were concerned in the transaction, and Luke Wales, one of the libellants, had liberty to go on shore the night on which the embezzlement was supposed to have been made, and did not return until the ship was under way for sea. The owners of the ship had, previous to the commencement of this suit, paid to the consignees the value of the packages so stolen. Hamilton, after the ship's arrival at Boston, was arrested for the theft, on the \*complaint of the master ; and was, at the hearing, in prison \*106 under an indictment found against him.

*Munroe*, on behalf of the respondents, objected to the evidence of any of the crew in this case, considering them all, as liable to contribute to the loss, and contended that evidence, given by any

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one of them of embezzlement by any of the rest, was illegal, and ought not to be received.<sup>1</sup>

That they being all ordered to be on board, any accident happening to the cargo in consequence of the negligence or misconduct of any part of them, rendered them all accountable.<sup>2</sup>

*Fales*, on behalf of the libellants, contended, that by the laws of England a seaman was accountable for his own individual conduct alone.<sup>3</sup>

That, if the whole crew were in any instance answerable in a body for embezzlement, it was only, when it was uncertain, which of them committed the offence. That in this case it was well ascertained who did commit the offence; and that the respondent had precluded himself, by his prosecution of Hamilton, from alleging his ignorance of the offender.

That the decisions cited for the respondent were supported by no others in this country, and were much weakened by the authorities adduced against them. That this case ought not, therefore, to be affected by them, but should be decided on general principles.

\*107 \* *Munroe*, in reply, argued, that it could not be inferred from the prosecution of Hamilton that the respondent considered him, as the only guilty one of the crew; he was arrested in consequence of some of the articles which were lost, having been found in his possession: that it was conceded by the other side, that

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<sup>1</sup> *Thompson v. Ship Philadelphia*, 1 Peters Adm. R. 211.

<sup>2</sup> *Sundry Mariners v. Ship Kensington*, 1 Peters Adm. R. 239. *Cramner et al. v. Ship Fair American*, 1 Peters Adm. R. 242. *Wilson v. Brig Belvidere*, 1 Peters Adm. R. 258. *Brevoort et al. v. Ship Fair American*, 1 Peters Adm. R. 87.

<sup>3</sup> *Thompson v. Collins*, 4 Bos. & Pul. R. 347. Abbott on Shipp. 326, and notes.

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the whole crew knew of Hamilton's having these articles, and if so, it was their duty to inform, or they made themselves parties to the guilt, and were, consequently, all liable to the contribution : that the cases, cited by the counsel for the libellants, were decisions at Common Law, and, therefore, could not avail to contradict those decided in the Admiralty.

STORY J. An exception has been taken to the competency of some of the crew, who have been sworn as witnesses, upon the general ground, that it is against the policy of the law to allow mariners engaged in the same voyage to be witnesses for each other. And some of the authorities cited do certainly go the length of asserting, that in suits, where the mariners have a common interest in the point in contest, they cannot be permitted to testify for each other. This is assuming a rule different from the Common Law, which does not reject the testimony in like cases, unless the witness have a direct interest in the event of the suit. - If he have an interest in the question, the objection goes to his credit only, and not to his competency. If, indeed, the maritime law does entertain another doctrine, it might be proper to adhere to it. But it is incumbent upon those who assert it, to establish the existence of such a doctrine. The *Consolato del Mare*<sup>1</sup> declares, that mariners may be witnesses for each other after the voyage is ended, where they are not interested in the event of the suit, nor have \* any expectation of \*108 gain or profit thereby.† This seems consonant with the rule of

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<sup>1</sup> Casaregis' Edit. ch. 221. Boucher's Edit. ch. 224, § 620.

† "Ancora più un marinaio può fare testimonio all' altro poi siano usciti del viaggio, con che non fusse interessato nel contratto nel quale sarà dato per testimonio, nè ché spettassino danno, nè utile ;" and Casaregis, in his explanation or commentary, says, "Un marinaio, terminato il viaggio, può testificare per l' altro." And Boucher translates the

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the Common Law. The Civil Law does not enumerate, among its exceptions to testimony, that, which is now contended for. While it sedulously guards against a person's being a witness in his own cause, or in one, from which he can derive benefit; † and excludes the testimony of persons standing in domestic relations with the parties, ‡ it exempts from this latter prohibition mariners in causes of the owner or master of the ship. §

The silence of the Civil Law in such a case is entitled to great consideration; for that law forms the foundation of the maritime usages of all Europe; and if to this we add also the silence of the positive codes of all the great maritime powers, every doubt, which may properly be indulged on this subject, is strengthened and increased. In the researches, which I have been able to make in the ancient and modern codes of commerce, not a single instance has been found, in which the exception contended for has been promulgated or enforced. Under these circumstances

\*109 I should hesitate a great while, before I should abandon \*the rule of the Common Law, which stands strongly supported by

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chapter thus: "Encore plus, le marinier peut servir de témoin à un autre marinier après le voyage, pourvu encore qu'il ne soit point intéressé dans la contestation, ni qu'il n'espère point de dédommagement ou profit"

† Nullus idoneus testis in re sua intelligitur. Dig. lib. 22, tit. 5, c. 10. Domat, B. 3, § 3, art. 6, 8.

‡ Etiam jure civili domestici testimonii fides improbat. Cod. de test. lex. 3. Pothier, Pand. 643, § 1, art. 6. Idonei non videntur esse testes, quibus imperare potest, ut testes fiant. Ibid. Dig. lib. 2, tit. 5, b. 8. Ferrière, voce *Témoin*. Domat, B. 3, § 3, art. 8. 1 Pothier, Ouvr. 404.

§ Cod. lib. 11, tit. 5, c. 3. Peck. ad Rem Nauticam, 397. Casaregis, Disc. 19, n. 28, 29. Cleirac. Contr. Marit. ch. 8, b. 145. Loccen. de Jure Marit. ch. 10, § 6. See also Laws of Wisbuy, art. 9, and 1 Valin, Comm. 302, 303.

principle and authority.<sup>1</sup> The objection, therefore, to the competency of the witnesses is overruled.

But the most important question still remains ; whether in any cases, and if so, in what cases, seamen are compellable to contribute their wages to indemnify the owner and master for embezzlements of the cargo of the ship.

There can be no doubt, that if an embezzlement be traced home to a particular mariner, he is responsible for the full value. And in a suit for his wages the Admiralty will make the proper deduction, or even under some circumstances sustain a direct suit for recompense in damages.

In cases of aggravated and inflamed plunderage, the maritime law imposes the additional forfeiture of the whole wages.<sup>2</sup> And the last clause in the usual shipping articles is meant to enforce this regulation.<sup>3</sup> In like manner, a mariner may be compelled to recompense the owner and master for any other loss, sustained by his fault, fraud, or negligence.<sup>4</sup> And if the fault, fraud, or negligence be very gross, and injurious, it may produce a total forfeiture of wages. In each of these cases, however, it seems, that neither public policy nor principle would extend the contribution, or forfeiture, beyond the parties immediately *in delicto* ; and that as to the rest of the crew, who are innocent, the same rules ought to apply, as if the offence were committed by mere strangers ; in which case it is admitted on all sides that no contribution is due.

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<sup>1</sup> *Hoyt v. Wildfire*, 3 Johns. R. 518. Abbott on Shipp. (Amer. Edit.) 1810, p. 540, note.

<sup>2</sup> *Consolato del Mare*, (Casaregis' edit.) ch. 164. (Boucher's edit.) ch. 167.

<sup>3</sup> Abbott on Shipp. (Amer. edit. 1810,) Appx. No. 8. *Thompson v. Collins*, 4 Bos. & Pul. R. 347.

<sup>4</sup> *Bellamy v. Russel*, 2 Show. R. 167. *Lane v. Cotton*, 1 Ld. Raym. R. 650, per Gould J. Molloy, b. 2, ch. 3, § 13. Cleirac, Judgment of Oleron, art. 11, p. 27, 28.

\* But it is asserted, that another doctrine has received the sanction of authority ; and that the policy of the law obliges mariners, engaged for the voyage, to be responsible for each other, so as to sustain the claim in such cases for a general contribution by the whole crew. Some of the cases cited establish a general contribution, even when some of the crew were in a situation to repel every presumption of guilt ; while others seem to proceed upon the ground, that, as it could not be fixed upon any person in particular, the presumption of guilt equally attached to all.<sup>1</sup> On the other hand, the doctrine of a general contribution for embezzlement has been recently questioned or denied in the Courts of Common Law.<sup>2</sup> And the present cause now stands before me upon a doubt, suggested by my learned brother, as to the solid foundation of the rule, by which he has felt himself heretofore bound to decide. Under these circumstances it has become the duty of the Court to review the grounds of the decision ; and to ascertain, if possible, what the maritime law has pronounced upon the subject.

It is remarkable, that in the Civil Law, where the subject of the thefts of mariners, and the consequent responsibility of the owner and master to the shipper, are distinctly treated of, not the slightest allusion is made either in the text, or in the most approved commentaries, to a general contribution.<sup>3</sup> The same silence, at least as far as my inquiries have extended, pervades, not only the positive codes of all Europe, but all the elementary writers upon maritime law, with the exceptions hereafter taken  
\*111 notice \* of, even where they discourse upon the subject of em-

<sup>1</sup> 1 Peters Adm. R. 239, 242. Bees R. 182. Abbott on Shipp. (Amer. edit. 1810,) p. 526, note 2.

<sup>2</sup> *Thompson v. Collins*, 4 Bos. & Pul. R. 347. *Lewis v. Davis*, 3 Johns. R. 17.

<sup>3</sup> Dig. lib. 4, tit. 9, ch. 1 - 7. Dig. lib. 14, tit. 1, ch. 1 - 7. Dig. lib. 47, tit. 5, lex unica. Peck. ad rem naut. h. t.



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bezzlements, from the epoch of the *Consolato del Mare* to our own times.<sup>1</sup>

The natural inference from these considerations would seem to be, that the rule of construction if ever established, has not been as universally adopted into the maritime law, as some of the recent authorities would lead us to imagine.

*Molloy* (book 2, ch. 3, § 9, cited also in *Sea Laws*, 455,) has been supposed to support the rule in its most enlarged extent. But even admitting his authority, which is certainly questionable, it may well be doubted, if the obscure terms, in which he has expressed himself, warrant such an inference. He barely states, that, "if the goods are so embezzled, or so damnified, that the ship's crew must answer, the owners must deduct the same out of their freight to the merchants, and the master out of the wages of the mariners." And he adds, "for before the mariner can claim his wages out of what the ship hath earned, the ship must be acquitted from the damage, that the merchant hath sustained by the negligence or fault of the mariners; and the reason is, for that as the goods are obliged to answer the freight, so the freight and ship are tacitly obliged to clear the damage; which being done, the mariners are let in for their wages."

*Molloy* has not attempted to enumerate the special cases, in which the crew are liable for goods embezzled; and if \* he is to \*112

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<sup>1</sup> *Consolato del Mare*, ch. 59, 77, 164, 195 (ed. Casareg.); ch. 62, 80, 167, 198 (ed. Boucher). *Targa*. ch. 17, § 12. *Roccus de Nav.* n. 40, 62. *Laws of Wisbuy*, art. 47. *Casaregis*, Disc. 23, n. 81. *Kuricke*, 714, n. 9. *Id.* 719. *Straccha de Nautis*, pt. 3, n. 18. *Stypmn. Jus. Marit.* pt. 4, ch. 17, p. 571. *Loccenius Jus. Marit.* lib. 3, ch. 8, f. 1037. See also the *Laws of Oleron*, of the *Hanse Towns*, of *Wisbuy*, of *France*, of *Rotterdam* in *Cleirac*, *Malyne*, *Peters R. App. Magens and Sea Laws*. *Rhodian Laws* in *Sea Laws*, p. 199, &c. and particularly § 1, art. 19, 20, p. 207, and § 2, art. 2, 3, p. 209; art. 50, p. 233. *Peck. ad rem naut. tit. Rhod. Jus. navale*, art. 1, 2, 3. *Malyne*, 103, 104. *Collection of Sea Laws* in *Malyne*, 55, 56. 1 *Emerig.* 381, 604.

be understood to assert in the reason given in the close of the passage, that the seamen are liable to a deduction of their wages in all cases, where the ship and freight, or rather the owner and master, are liable for damage of the goods, his position is not law. It seems to me that his real meaning is, that the seamen are responsible only, when the damage has been sustained by their own fault or negligence. And the learned Mr. Chief Justice *Kent* has placed this doctrine upon its true footing.<sup>1</sup> *Molloy*, therefore, may be safely dismissed without further comment.

*Valin*, however, speaks in a more clear and decisive language. After remarking, that embezzlements are very common in voyages from America, (the American Colonies of France,) and that it is extremely rare, that the offenders are discovered, he says, that the policy adopted to indemnify the shippers, *when the thief cannot be ascertained*, is, to apportion it upon the whole crew indiscriminately, as well the captain, as the officers and seamen, according to the ratio of their respective wages. And he adds, that this apportionment is made upon the captain and officers, not from any suspicion, that they are concerned in the offence; but to make them more attentive, from personal interest, to prevent embezzlement by the crew. And he distinctly admits, that no contribution can be claimed, when the goods have been stolen by a particular person.<sup>2</sup> The authority of *Valin* stands deservedly high from his general accuracy and learning. But it is not quite clear, whether he means here to speak of a general rule of the maritime law or French law, or of a particular custom in the American trade. If the latter be his meaning, and there is much probability in the supposition, it has nothing to do with the question before the Court. This suppo-  
 \*113 sition derives \*some confirmation from the fact, that neither

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<sup>1</sup> *Lewis v. Davis*, 3 Johns. R. 17.

<sup>2</sup> 1 *Valin*, Comm. 459, 460.

*Emérigon* nor *Pothier*, in treating upon the general subject, refer to any such apportionment.<sup>1</sup> But let us proceed to consider the doctrine of *Valin*, assuming him to pronounce it as a general rule of the maritime law. It must be admitted in the first place, that he does not contend for a contribution, when the offence is fixed upon an individual; but only when the author is unknown. In the next place, he makes no distinction as to contribution, whether from the facts of the case the presumption of committing the offence rest upon the whole, or a part of the crew, or upon mere strangers; and yet a distinction in the latter case is strongly upheld by principle and authority. In the third place, he cites no authority for his doctrine; and no inconsiderable difficulty attends it, since it derives no support from other maritime Jurists, or from the acknowledged principles, that regulate the contract for hire. Why should a mariner, any more than any other laborer on wages, be responsible for the acts of others, in which he has had no participation or connivance? If he has been guilty of fraud, or negligence, or has connived at, or aided in, the embezzlement, he may be justly charged upon the general principles of the contract. But if nothing of this sort be justly imputable to him, it is not easy to perceive, why he should be responsible for those, over whose actions he has no legal control. And whatever may be the policy of including the officers of the ship in the general contribution, it remains to establish its legal propriety and justice.

It is certain, that the doctrine of *Valin* has not been incorporated into the English maritime law; or, at least, its existence is nowhere clearly stated, or proved. And it has been very pointedly remarked, "that if such be \* the rule of law, it is \*114 scarcely possible, but that it must have been often mentioned in

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<sup>1</sup> 1 *Emérig.* 381, 604. *Pothier, Louage Marit.* p. 2, § 2, n. 153. *Id.* p. 3, § 2, n. 178.

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our (English) books, and as well known, as any rule of maritime law, since frequent occasions must have arisen for the application of it.”<sup>1</sup> And in the very case, in which this remark was made, it was manifestly the opinion of the whole Court, that no such rule existed. The construction, too, put by the Court in that case, upon the last clause in the shipping articles, (which is also in the usual shipping articles in the United States,) negatives altogether the notion of any joint responsibility. That construction is, that the words are to be referred respectively to every seaman, who shall plunder, embezzle, or commit an unlawful act; so as to make each person answerable only for his own default. It appears to me, that this decision is founded in sound reasoning; and if so, it must entirely supersede the supposed rule of contribution now contended for, in all cases governed by the shipping articles; since it is the law of the contract, and excludes every contradictory implication.

Nor does the supposed rule of contribution gain any additional force from the analogous cases, where compensation is made by the officers and crew for losses occasioned by bad ropes, or negligence in hoisting or storing goods. Notwithstanding the language in some of the authorities, it may well be doubted, if the contribution in those cases extends beyond the persons, by whose fault or negligence the damage has been occasioned.<sup>2</sup>

Upon the whole my opinion is, that the rule of contribution, as \*115 contended for at the argument, and as asserted \*by *Valin*, cannot be sustained as a general rule of the maritime law; that it has not that general sanction, or universal use, which entitles it

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<sup>1</sup> Per Chief Justice *Mansfield*, in *Thompson v. Collins*, 4 Bos. & Pul. R. 347.

<sup>2</sup> See 1 Peters R. 258. Laws of Oleron, art. 10, 11, 27. Laws of Wisbuy, art. 49. Malyne, 103. Sea Laws in Malyne, 55. 2 Valin, Comm. 79, 161. Casaregis, Disc. 23, note 65, *et seq.* Consolato del Mare, ch. 24 (Casaregis' edit.), ch. 247 (Boucher's edit.).

to such a consideration ; and that it has not such intrinsic equity or justice, as that, in the absence of direct authority, it ought to be adopted as a limit upon judicial discretion. On the contrary, it seems to me, that the true principles, which are to govern in these cases, are those of the general contract of hire ; and that the most, that the maritime law has done, is to enforce these principles, by allowing the owner and master to make an immediate deduction from the wages of the offending parties, instead of driving them to the circuity of an action for damages. The result of this opinion is, that where the embezzlement has arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to it, in proportion to their wages : that where the embezzlement is fixed on an individual, he is *solely* responsible : that where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. But that where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master : that in no case are the innocent part of the crew to contribute for the misdemeanors of the guilty ; and further, that in a case of uncertainty, the burden of the proof of innocence does not rest on the crew ; but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded. In delivering this opinion, I am fully aware, that it encounters that of learned Judges, for whom I entertain the most entire respect and deference ; and the weight of their judgment has induced me to pause at every step of the investigation. \* But after much deliberation I have pronounced \*116 the opinion, which has my most unhesitating assent. It stands supported, as I trust, by the negative testimony of the oracles of the Civil and Maritime Law ; and by the positive adjudications

of some of the most respectable judicatures of our own country, and Great Britain.<sup>1</sup>

It will now become necessary to apply these principles to the present case. In the first place, the *cook* was grossly disobedient as well as negligent, in removing the partition, by which the loss was occasioned. He ought, therefore, to contribute to the whole extent of his wages. In the next place, there is a vehement suspicion attached to Hamilton and Bush, as being either principals, accessories, or connivers in the embezzlement. The goods, found in their possession, are said to be of the same description as some of those stolen. Under such circumstances, it is incumbent on them to explain the manner, in which these goods came into their possession ; and, if they fail so to do, the presumption of their innocence is not maintained. In respect to the rest of crew, as neither the time, manner, nor circumstances of the embezzlement, are distinctly proved, it is difficult to charge them with fraud, negligence, or connivance. It is the undoubted duty of mariners to attend carefully to the preservation of the ship and cargo. But the general presumption of law, that every man does his duty, ought to prevail in their favor, until the contrary is shown. The burden of proof, to establish the right of contribution, rests in this case on the respondent ; and, as he has not supplied that proof, a decree must be pronounced, that the libellants, with the exception of Bush and Hamilton, recover their wages. Under the circumstances, no costs are to be allowed to either party.

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<sup>1</sup> *Thompson v. Collins*, 4 Bos. & Pul. R. 347. *Abbott on Shipp.*, p. 4, ch. 3, § 5. *Lewis v. Davis*, 3 Johns. R. 17.

## HENRY POPE AND OTHERS v. CHARLES BARRETT.

In assumpsit against a consignee or bailiff of goods "to sell the same and render a reasonable account," damages, for not remitting when exchange was favorable, are not allowable.

*Quære* how it would be if there was a special promise to remit, and a breach assigned in the declaration?

Interest is allowable in such cases, and also in actions for money had and received, from the time of a demand made, where the defendant has refused to account or to make payment, or has converted the money to his own use.

**ASSUMPSIT.** The first count was for \$ 7000, money had and received of the plaintiffs. The second count charged, that the defendant was bailiff of the plaintiffs of 23 packages of goods of the value of \$ 7000 "to sell and dispose thereof to the best advantage," and in consideration thereof "promised the plaintiffs to render them a reasonable account thereof on demand," and alleged that the defendant, though specially requested, had not rendered any reasonable account. The plea was the general issue. At the trial it appeared among other things in evidence, that the goods in question were consigned by the plaintiffs, who were merchants in Manchester in England, to one George Barrett, the brother and partner of the defendant, for sale and remittance, in the year 1811. The goods were first shipped to Canada, but were intended ultimately for sale in the United States. In 1812, George Barrett went to New Orleans and left the whole business under the agency of the partnership. George Barrett died in that year during his absence on the journey, leaving the defendant surviving partner of the firm, who assumed the agency, and sold, or directed the goods to be sold. The defendant had been repeatedly called on by the plaintiffs to account for the sales, and to remit the proceeds; but had declined to render any account, and offered no evidence \*whatsoever, either to excuse or defend himself against the action, relying altogether upon the supposed defect of the plaintiffs' evidence \*118

to sustain their case. The principal evidence of the plaintiffs arose from letters written by the defendant to the plaintiffs, or to the plaintiffs' attorney. In the latter he admitted, that the net proceeds of the sales, yet coming to the plaintiffs, would be about 1200*l.* sterling, but declined to go into any explanation, in detail, of the sales, or of the money, which had been actually received by him; and excused himself by pretences, that the means of an exact statement were not then in his possession.

The invoice value of the twenty-three packages of goods was 1648*l.* 4*s.* 10*d.* sterling; from this a deduction was admitted of 100*l.* 14*s.* 3*d.*, and 119*l.* 12*s.* for remittances made by George Barrett in his lifetime. The action was brought to recover the balance of 1421*l.* 18*s.* 7*d.* sterling, and also the sum of \$ 1148, which had been received by the defendant under a special power of attorney, as part of a debt due from Messrs. Bond and Prentiss to the plaintiffs. There was no dispute, that this last sum was due, and the defendant declared himself to have been always ready to pay it.

*R. G. Amory*, for the plaintiffs, contended, that they were not only entitled to the principal sums and interest, but also to fifteen per cent. for the difference of exchange; which would have been a profit to the plaintiffs, if the remittance had been made at the time when the defendant ought to have remitted the money, received from the sales of the twenty-three packages. He claimed interest on the 1421*l.* 18*s.* 7*d.* sterling and \$ 1148, from the first of January 1814, and the rate of exchange in England, which, at the same period, was fifteen per cent. below par.

- \*119 \* *Cooke*, for the defendant, on the other hand, contended, that no interest was due, because the plaintiffs had not proved any direct demand or refusal, before the commencement of the suit;



nor any specific period of time, when the sales of the goods were made, and the proceeds received by the defendant. And he further contended, that, for the same reasons, no difference of exchange ought to be allowed. And that as there was no special promise to remit the proceeds, or special damages laid in the declaration, even if a difference of exchange were, in a case like this, recoverable at law, no recovery could be here had for want of an appropriate declaration.

STORY J., after summing up the facts, directed the jury, that if they were satisfied from the evidence, that the defendant became the agent, consignee, or factor of the plaintiffs; (which appeared to him very strongly in proof) then, as the defendant had utterly refused to render any account of his sales, that the most unfavorable presumptions, which the evidence would admit of, ought to be made against him, in respect to the amount and value of the goods sold and unaccounted for. That as the case was principally supported by the written confessions of the defendant, those confessions were to be taken and weighed all together; and damages ought to be given to the full value of the goods, which came into the hands of the defendant, deducting therefrom all proper charges for disbursements, commissions, and expenses. And that interest ought to be allowed upon the amount, so found due, from the time of the actual sales, or the earliest subsequent opportunity to remit, up to the time of giving their verdict. That if the time of the actual sales was not distinctly proved, they ought to adopt that period, which, under all the circumstances of the case, seemed reasonable. That the defendant was not absolutely bound to remit during \*the war\*<sup>120</sup> with England; for it might involve him in the penalty of illegal intercourse. But that he was bound to remit at as early a period after peace, as the case would admit. That under all the circumstances, perhaps it might be considered, that the sales were

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not all completed, and the remittances could not have been made earlier than August, 1815; and if they were of that opinion, interest ought to be calculated from that date.

In respect to the damages claimed under the special count, to account for the loss occasioned by the difference of exchange in not remitting the money, he doubted whether, as that count was framed, such an item of damages was admissible; as a promise to account upon a consignment to sell and dispose of the goods to the best advantage, did not seem to him to include a promise to remit the proceeds. Nevertheless, as the plaintiffs claimed such an allowance, for the purposes of this trial, he would direct them, that if they were satisfied, that, according to mercantile usage, when goods were received on consignment to sell and account for the same, the consignee, after sale, was bound to remit the net proceeds to his employer, without any special direction, and to allow him the benefit of the rate of exchange on the remittance; then they might add the item of the difference of exchange to the amount due to the plaintiffs.

The jury found a verdict for the plaintiffs for \$ 9335 92 cents; and, upon an inquiry from the Court, at the suggestion of the defendant's counsel, they declared, that they had allowed twelve and a half per cent. for the difference of exchange, considering it perfectly clear, that, according to mercantile usages upon foreign consignments, the remittances ought to have been made, and the benefit of the then state of exchange allowed to the consignee. They added, that they had given the plaintiffs the full invoice  
\*121 value of \* the goods, without any deductions for commissions or charges, because, taking all the circumstances of the case together, they were satisfied, as the defendant had rendered no account, and still refused to render any, that the goods sold for more than the invoice value, and the charges and commissions added to it.

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After verdict, *Cooke* moved for a new trial.

1st. For misdirection of the Court, as to the allowance of the difference of exchange and interest.

2dly. Because the jury had given excessive damages.

Upon the first ground he urged the same reasons that he had urged before at the trial, and further, that no interest ought to have been allowed on the \$ 1148, because it was received under a special authority, and there was no promise to remit ; and that interest ought not to have been allowed without a special count for that purpose. That the counts in the declaration stated the promises to be made on the second day of January, 1813, and no money subsequently received could be recovered in this action, as it would not be a bar to any subsequent action. Upon the second point, he relied in addition upon the fact, that the jury had allowed the full invoice value of the goods, without any deduction for disbursements and commissions.

*Amory, e contra.* Insisted that the defendant in fact promised to remit, as appeared by the original correspondence. That if the party was to account, the manner of accounting depended upon the circumstances of the case, and the original instructions. That however special those instructions might be, it was sufficient to charge in the declaration, that the party had promised to account generally, and the special manner was mere matter of evidence ; and that all damages for not accounting might be recovered, without laying the special damages in the declaration. That the interest \* was clearly allowable. The defendant had \*122 utterly refused to do his duty, and having kept the money of the plaintiffs, he was bound to pay interest for it ; and that the uniform practice of the Supreme Court of Massachusetts was to allow interest in such cases.<sup>1</sup>

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<sup>1</sup> *Wood v. Robbins*, 11 Mass. R. 504.

STORY J. The first question respects the direction of the Court, as to the allowance of the profit, which would have accrued to the plaintiffs, if the proceeds of the sales of the consignments had been remitted to them in due season.

At the trial, I felt great doubts if this item could be properly allowed in damages, under the declaration. It was clearly inadmissible under the count for money had and received.

The special count, after stating the goods to have been received, "to sell and dispose thereof to the best advantage," and the promise, by the defendant, to render to the plaintiffs a reasonable account thereof on demand, assigns as a breach, the refusal to render such an account. There is no averment, that the defendant promised to remit the proceeds; and of course no breach assigned, or special damages claimed, for the violation of any such promise. Upon farther reflection since the argument, I am satisfied, that my doubts at the trial were well founded. Assuming that the plaintiffs could entitle themselves to the difference of exchange, upon a count properly formed for that purpose, from the neglect to remit in due season; the claim cannot be sustained under the present declaration. The contract here stated is merely to sell the goods, and render a reasonable account of the sales. Upon this count the defendant was not bound to remit; and if not so bound, he could not be liable for \*123 any loss occasioned by his omission \* to make a remittance.

It is no sufficient answer, that the defendant would have been completely exonerated, if he had remitted the proceeds, by purchasing a bill of exchange; or that the plaintiffs, by the omission, have lost a profit, which they might otherwise have obtained. The defendant has a right to say, *non in hæc fœdera veni*. It is not for every possible loss, that the promisor renders himself liable by a breach of his promise. A party may, by the non-payment of money due to him, lose the opportunity of an advantageous bargain; but such a loss is not recoverable in an action for the money due.

Upon every consignment of goods for sale, the law raises a promise to account ;<sup>1</sup> but that promise is completely satisfied by payment over of the proceeds of the sale, upon demand of the consignor. If the usage of trade, or a special contract, bind the party to remit, it is an obligation, which the law does not enforce, unless averred in the declaration, and put in issue by the parties. Nor is it true, as supposed in the argument, that under a declaration to render a reasonable account, the plaintiff might give in evidence a contract to account in a special manner. However true this doctrine may be in actions of account, in respect to which special reasons may apply,<sup>2</sup> in actions of assumpsit the contract must be proved as laid ; and if the undertaking be special, it must be so stated, or the variance will be fatal. If the law were otherwise, it would not help the present case ; for a promise to remit is not, in the intendment of law, a promise to account in a special manner. It is to all important purposes, an independent and distinct part of the contract.

There might, indeed, be some question, whether, under a special count, the loss of the difference of exchange would \* be \*<sup>124</sup> recoverable. The claim is founded on a rule, which will not always work equal justice. If the exchange be below par, then if the defendant does not remit, the plaintiff may have the difference, because the rule works in his favor. But if the exchange be above par, and the defendant does not remit, shall the latter be entitled to a proportionate reduction of the damages ? If so, then the defendant gains a profit by his fraud or negligence ; if not, then the rule has not that universality, which commends it for general adoption. However, on this I give no opinion. It is sufficient to decide what is necessarily before us. And my

<sup>1</sup> *Wilkins v. Wilkins*, 1 Salk. R. 9. Carth. 89. *Topham v. Braddick*, 1 Taunt. R. 571.

<sup>2</sup> *Robert v. Andrews*, Cro. Eliz. 82. *Godfrey v. Saunders*, 3 Wils. R. 73.

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opinion accordingly is, that, upon this declaration, as framed, this item ought to be expunged from the damages. I will only add, that except in actions upon foreign bills of exchange, I have not found an instance, where re-exchange, or the difference of exchange, has been allowed in damages; and in cases of mere debts, it has been expressly denied.<sup>1</sup> The very form of declaring in assumpsit against a bailiff or factor, is of comparatively modern origin, as a substitute for the action of account.<sup>2</sup> And in an action of account, a bailiff *ad merchandizandum* could not have been made chargeable, but for profits actually received in the way of merchandise.<sup>3</sup> Profits upon remittances do not seem ever to have been claimed or allowed.<sup>4</sup>

The next question is, as to the allowance of interest upon the sums found due to the plaintiffs. In the English decisions there has been a singular fluctuation of opinion. The rule, at present \*125 established in England, seems to be, not to \*allow interest except in cases, where there is a written contract for the payment of money on a certain day; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, such a promise may be implied; or where it can be proved, that the money has been used, and interest has been actually made.<sup>5</sup>

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<sup>1</sup> *Mellish v. Simeon*, 2 H. Bl. R. 378. *Hendricks v. Franklin*, 4 Johns. R. 119. *Martin v. Franklin*, 4 Johns. R. 124.

<sup>2</sup> *Wilkins v. Wilkins*, 1 Salk. R. 9. *Carth.* 89. *Poultter v. Cornwall*, 1 Salk. R. 9. *Bull. N. P.* 148. *Topham v. Braddick*, 1 Taunt. R. 571.

<sup>3</sup> *Com. Dig. Accompt, E*, 10. 1 Roll. Abr. 125, B. 35, 36, 40.

<sup>4</sup> *Godfrey v. Saunders*, 3 Wils. R. 73. *Topham v. Braddick*, 1 Taunt. R. 571.

<sup>5</sup> *De Havilland v. Bowerbank*, 1 Camp. R. 50, 51. *De Bernales v. Fuller*, 2 Camp. R. 426, 428, note. *Callon v. Bragg*, 15 East R. 223. *Slack v. Lowell*, 3 Taunt. R. 157. *Gwyn v. Godby*, 4 Taunt. R. 346. *Middleton v. Gill*, 4 Taunt. R. 298. *Marshall v. Poole*, 13 East R. 98, and see *Mitchell v. Minikan*, 6 Taunt. R. 117.

In the United States a more liberal policy has been pursued ; and interest has been allowed in a variety of cases, where it would have been refused by the English Courts. Without going over the cases, which are ably collected by Mr. Justice *Putnam*, in delivering the opinion of the Court in *Wood v. Robbins*,<sup>1</sup> it seems to me, that the principles are perfectly sound and equitable, which assert, that interest is payable, when a man receives the property or money of another, and holds it against his consent, or converts it to his own use, or improperly refuses payment after a demand.<sup>2</sup> In the present case it may be admitted, that no interest was due until after a demand made ; or until gross laches and delay of payment, contrary to the express or implied contract of the parties. In respect to the special count, no interest could accrue until after a special demand of an account ; for until that was made, the party was in no default.<sup>3</sup> But there is the strongest presumptive evidence of such a demand, long before the period at which the Court directed the jury to allow interest. In respect to the count for money had and \* received, there is no difficulty in sustaining the claim for \*126 interest. The money, received from Messrs. Bond and Prentiss, was in the hands of the defendant at least a year before the period above stated ; and, from the circumstances of the case, a demand and gross laches may be reasonably presumed against the defendant. There was also, from the same circumstances, a strong presumption, that the goods on consignment had been all sold, and the net proceeds received by the defendant, long before the same period. The defendant utterly refused to render any account of the sales, or to pay over the proceeds, after an explicit demand for this purpose. There was, therefore, not only

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<sup>1</sup> 11 Mass. R. 504.

<sup>2</sup> *Commonwealth v. Crever*, 3 Binn. R. 121. *Delaware Ins. Co. v. Delannie*, 3 Binn. R. 295. *The People v. Gasherie*, 9 Johns. R. 71.

<sup>3</sup> *Topham v. Braddick*, 1 Taunt. R. 571.

a gross departure from duty, which would have authorized the jury to give interest; but the jury had a right to infer, from the conduct of the defendant, that he had unjustifiably converted the money to his own use. This is not all. By the contract of consignment, as well as by the usage of trade, as found by the jury, the defendant was bound to remit the proceeds; and by his neglect so to do, he has justly incurred the payment of interest; for this, at least, is a loss actually sustained by the plaintiffs. In every view, therefore, of this case, the jury were fully justified in making an allowance of interest from August, 1815; for there was a strong presumption, that the money was, after a demand, withheld against the plaintiffs' consent; that it was converted to the defendant's own use; and that there was a gross and improper refusal of payment. In estimating the interest, however, it appears, that the jury have by mistake, allowed a year's interest more, than according to the direction of the Court, they intended to allow. This sum must, therefore, be deducted from the verdict.

The defendant also complains of the verdict, because the jury have allowed the full amount of the invoice value of the goods, without any deduction for commissions or charges. The jury \*127 were expressly directed \* to make such an allowance, and have assigned as a reason for giving the full invoice value, that, from the circumstances of the case, the goods having ultimately come to a high market after the peace, and the defendant having refused to render any account, they were satisfied, that they sold for a sum beyond the invoice value, sufficient to satisfy all charges. I cannot say, that the verdict was not fully justified by the facts of the case. There was the most reprehensible and studied refusal of the defendant to render any account, even at the trial. He contented himself with a profound silence, as to evidence of his own conduct, leaving the plaintiffs to grope their way through the cause, by doubtful and glimmering lights, gathered from his



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own imperfect confessions. If he has suffered by the verdict, it has been his own folly and gross negligence; and if it were properly within the province of a Court to weigh in minute scales the items of damages, (which it certainly is not,) I should have been at a loss to conceive a reason for setting aside a verdict, so perfectly, in this case, consistent with the principles of equity and good faith.

Upon the whole, there must be a new trial, unless the plaintiffs will consent to remit the sum allowed for the difference of exchange, and the extra interest. If these sums are remitted, neither law nor justice requires the Court to accede to the motion.

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YOUNG SEAMANS v. CALEB LORING AND OTHERS.

In a policy at and from a port, the construction of it, as to the time when the policy attaches, depends on circumstances. If the vessel be in a foreign port, in the course of a voyage, it attaches from her first arrival there. If in a domestic port, then from the date of the policy. If the vessel has been long lying in port, without reference to any particular voyage, there it attaches from the time preparations are begun to be made for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until after his ownership commences. \*128

If a policy be for A B, or whom it may concern, and made by an agent without any warranty, or representation of national character, it will cover the interest of any person, whether an American or foreigner, who has authorized the insurance. By a policy on vessel and cargo, a party having a lien for advances, or a special ownership and possession, may protect his interest in the vessel and cargo, to the extent of his advances and lien. By the usual clause in policies, as to prior insurances, the underwriter is exonerated, if prior insurances to the full value of the vessel and cargo, have been actually made by the assured on the same voyage, and in full force at the time, although by a subsequent agreement between the assured and such prior underwriters, before the risk is commenced, the prior policies are cancelled.

It seems that if a vessel be described in the policy to be a prize vessel, and afterwards her national character be changed, so as to increase the risk, this discharges the underwriters.

If, in a policy "at and from," the assured unreasonably delay to commence the risk,

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or the voyage, the underwriter is discharged. It amounts to a non-inception of the voyage insured.

**T**HIS was an action brought by the plaintiff, as indorsee of the executors, &c. of Amos M. Atwell, an insurance broker, to recover a premium note signed by the defendants, and dated the 7th of February, 1814, for the sum of \$ 1401, payable to the said Atwell, or order, in ninety days after date. The cause was tried upon the general issue, when the following facts appeared : —

The policy, for which the premium note was given, was underwritten in the office kept by Mr. Atwell, at Providence, in Rhode Island, on the 7th day of February, 1814. By the policy, “ Messrs. Loring and Curtis, of Boston, for Leonard Jarvis, the 3d, or whom it may concern, do make insurance, and cause him or them to be insured, lost or not lost, arrived or not arrived, the sum of \$ 2800, on the brig Fame and appurtenances, and on her cargo on board, at and from Bergen, in Norway, to Boston, or a port of discharge in the United States, and until the cargo is safely landed. The brig Fame was an English vessel, captured by a privateer and sent into Norway, and it is \*129 not known whether she has been condemned as prize or \*not; in case of loss, payable to said Loring and Curtis only, or their order, whereof is master for this present voyage Justus B. Lockwood, or whoever else shall go master in the said vessel, &c. beginning the adventure upon the said brig Fame, appurtenances, and cargo, at Bergen as aforesaid, &c.” In the margin, the insurance was declared to be on vessel \$ 600, and on cargo \$ 2200. The premium fifty per cent. At the close of the policy was the following clause.

“ And it is the express condition of this policy, that the subscribers hereto shall be discharged from every risk, in case the same property should be wholly assured by any policy, or poli-

cies, actually prior to this. But should any part of the same property remain unassured by such prior policy, or policies, or if the sum, assured by this policy, should exceed the true value of the property at risk, then the first subscribers hereto, and those next in succession, shall be held to bear and take the risk of the sum written by each respectively, until the real amount of the property at risk shall be fully assured, and the subsequent subscribers to this, *and policies of a later date*, shall be discharged from every risk. But every subscriber, though discharged from the risk, shall be entitled to one half per centum on the sum written by him. But in all cases of return premium, one half per cent. to be retained by the assurers."

The insurance was effected under the following circumstances : — Mr. Leonard Jarvis had, in his hands, funds belonging to the defendants, which he was desirous of remitting to the United States, but not finding any convenient mode, he entered into a negotiation with Mr. Preble, of Paris, whereby he agreed to advance him 100,000 francs, and take his bills of exchange, endorsed by Mr. Daniel Parker, of Paris, and drawn on the defendants, \*for the \*130 amount. Mr. Preble was, at that time, owner of the privateer True-Blooded Yankee, which had sent several prizes into Bergen, in Norway, and among others, the brig Fame and cargo; and it was agreed, that the said brig and cargo should be sent to Boston, under the control of Jarvis, and in his name consigned to the defendants, who were, out of the proceeds, to pay the amount of the bills so drawn on them. Mr. Jarvis, by a letter dated Paris, November 10th, 1813, wrote the defendants, giving them information of this negotiation, and in his letter are the following paragraphs: — "Mr. Preble has, in Norway, at his disposition, about 150,000 yards of Irish linen, and 1200 yards of table linen, together with a fine brig of 200 tons, prize to the privateer, to which he is agent. I have agreed to advance him 100,000 francs, upon the following conditions : — 1st. That I should have the entire con-

trol over it, and expedite it to Boston in my name, as security for the advance I made, consigning it to you, and giving you orders for the insurance, covering the amount. At foot you will find note for insurance, that you will not fail to have effected, as Preble would by no means be uncovered." Note for insurance, — "Thirty thousand dollars, covering the premium, on brig Fame and cargo, at and from the port of Bergen in Norway, to that of Boston in America, warranted to sail during the winter, for account and risk of Leonard Jarvis, 3d. If you can leave out the warranty, without much affecting the rate of premium, it would be better." The defendants applied to Mr. Atwell to procure the insurance, by a letter dated on the 1st of February, 1814, and in that letter they stated the commendations, bestowed by Mr. Jarvis upon Captain Justus Lockwood, who was to be the master for the voyage, and upon the vessel; and among other things, that it "is expected she will sail about the 1st of January, so that we may look for her in all February. Her cargo will

\*131 consist of linens; the \*vessel was captured, we believe, by the True-Blooded Yankee." The letter further stated the form of the policies underwritten upon the same vessel and cargo, for the same voyage, in Boston, and then adds: — "We have effected upwards of \$ 37,000, at the public and private offices;" and afterwards, "we may wish to have \$ 23,000 done, instead of \$ 15,000, if you can effect it." In another letter of the defendants to Mr. Atwell, dated the 5th of February, they state, (and give the particulars) that \$ 41,000, had then been underwritten in Boston and Salem. Between the date of this letter, and the effecting of the policy at Providence, there was an additional sum underwritten on the prior policies, so that on the 7th of February, 1814, those policies, which were on the same voyage, and precisely in the same terms with the Providence policy, covered, in the aggregate, the sum of \$ 43,700, on vessel and cargo, viz. \$ 9190, on the vessel, and \$ 34,510, on the cargo.

The brig *Fame* arrived at Bergen, in Norway, in March, 1813, and her cargo was immediately taken out and put into the government stores. As soon as the negotiation between Messrs. Jarvis and Preble was completed, in November, 1813, Captain Lockwood was despatched by them from Paris to Bergen, and he received orders, before his departure, from Mr. Preble, to sell the brig and cargo at public sale, payable in undoubted bills on Paris, and that if Mr. Jarvis should instruct him to purchase the brig, and about 151,000 yards of linen, he (Lockwood) might draw on Mr. Preble for the amount. Accordingly Mr. Jarvis did so instruct Lockwood to purchase the brig and linens, and draw on Mr. Preble, as had in fact been previously arranged between himself and Mr. Preble. Mr. Lockwood was farther instructed, that if he purchased the brig and linens for Mr. Jarvis, to put her under American colors, \*take the command\*<sup>132</sup> of her as master, ship said linen on board, with a sufficient quantity of iron to ballast her, and proceed to Boston, and there deliver the vessel and cargo to the defendants. Mr. Lockwood did not arrive in Bergen until April, 1814, when he found the brig stripped, and moored in one of the outer harbours of Bergen. The linens were then in Mr. Janson's store, under the seal of the government, who refused to permit the brig to leave the port, and either the brig or linens to be sold. Some time afterwards liberty was obtained from the government to sell the white linens, and accordingly they were sold by public auction, and generally bought in by Captain Lockwood, for the account of Mr. Jarvis; and finding the prices good, he proceeded to sell the same linens by retail. The government, however, still withheld the brown linens, asserting that they were wanted for the use of their soldiers. Mr. Jarvis, having received information of these facts, in the autumn of 1814 made a direct contract with Mr. Preble for the sale of the vessel and cargo, and determined immediately to proceed to Bergen. Accordingly Mr.

Preble, in October, 1814, executed a bill of sale of the brig to Mr. Jarvis ; and sent directions to his agents, at Bergen, to deliver over the cargo to him, and to account with him for the proceeds already sold. In November, 1814, Mr. Jarvis arrived in Bergen, and there found Captain Lockwood selling the white linens by retail at a good price, and engaged in negotiation with the government respecting the price to be paid by them for the brown linens, which were still in the stores, under the government seals. Mr. Jarvis, being about to return to Paris, gave instructions to Captain Lockwood, to have the brown linens sold by public auction, and bought in on his account, in the same manner that the white linens had been ; (which, it was stated, could have been procured to be done, by a little management \*133 with the officers of the government) and to \* sell the same by retail, unless the whole could be sold at an advantageous price. But, just on the eve of his departure, the negotiation with the government was completed ; and they agreed to purchase the brown linens at a great price ; and Mr. Jarvis ratified the sale. At this time, all further thoughts of performing the original voyage to Boston, were laid aside. Mr. Jarvis returned to Paris, and again returned to Bergen, in March, 1815. In the mean time the government had, by the intervening peace, become dissatisfied with their bargain, and finally agreed to return the brown linens to Mr. Jarvis, and to pay him 1000*l.* sterling, as a remuneration for his loss. The proposal was accepted ; and the brown linens were accordingly restored. Mr. Jarvis then directed the brig and brown linens to be sold by public auction, with a view to change the apparent property, and they were accordingly sold ; and the brig, and a great part of the linens, were purchased upon his account, by a Mr. Hans Reimer of Bergen. The brig was then put under Swedish colors, her name changed to the *Waren*, and she had a Norwegian register and other documents, and a Norwegian master and crew. Mr.

Jarvis, at first, intended to send the brig, with the residue of the linens, to France; but the return of Bonaparte from Elba, induced him to give up this voyage. He next projected a voyage to the West Indies, and finally determined to send the vessel to the United States. Accordingly the remaining linens were, in the latter part of May, 1815, put on board of the brig, documented as a Swedish vessel. She sailed on the voyage about the 22d of June, and arrived in Boston in August, 1815. The cargo was stated, in the invoice, to be shipped by Mr. Jarvis, on account and risk of Messrs. Loring and Curtis, and consigned to them. The invoice value of the cargo, (which was sworn to be the true value) was \$ 16,258·16, and the value of the vessel \$ 2862, to cover which, at fifty per cent. premium, \* would re-<sup>\*134</sup>quire double the amount, viz. \$ 5724 on the vessel, and \$ 32,516 on the cargo, in the whole \$ 38,240·32.

In consequence of information received, by the defendants from Mr. Jarvis, of the state of the property, the defendants, between the 20th and 24th of December, 1814, procured a memorandum to be underwritten upon eight of the policies, which covered the sum of \$ 28,300, in substance as follows:—  
“It is agreed, that the delay in the sailing of the *Fame* from Bergen, shall not be considered as a deviation, the assured warranting, that she shall sail for the United States on or before the first day of February, 1815. The assured also warrant, that the goods were sound at the time of the shipment. If the *Fame* does not sail before the second day of February, and the risk ends without a loss, the whole premium is to be returned, excepting a reasonable compensation for the risk which shall have accrued.” These policies were afterwards cancelled upon payment of one half per cent. All the other policies were also cancelled in March and April, 1815, except the Providence policy, upon the payment of one half per cent.

The underwriters on the policy, at Providence, were applied to for the purpose of agreeing to a like memorandum ; but they declined inserting it.

Upon this evidence, the following points were made by *Hubbard* and *Præscott*, of counsel for the defendants :—

1st. That by the policies, prior to the Providence policy, there was an insurance to a greater amount, than the whole property at risk.

2dly. That the policy never attached ; because there never was any fitting out of the vessel upon the voyage originally insured, the delay amounting to a deviation from the voyage.

3dly. That the policy never attached ; because the insured \*135 had no interest in the vessel or cargo, at the time of \* underwriting the policy, but acquired it afterwards, in October, 1814, and not before.

4thly. That the policy never attached on the vessel ; because she was altered from a prize vessel to a Norwegian, before the risk began, which materially increased the risk.

*Townsend*, for the plaintiff, on the other hand, contended, that there was no over-insurance ; the property being grossly undervalued in the evidence offered by the defendants, and the markets at Bergen affording no standard of its real value.

2dly. That if the value were, as stated by the defendants, still as the prior policies were, by the memorandum and agreement of the parties, cancelled or varied, so that they never attached upon the property insured, they were to be considered as if they never had existed, and, consequently, there was sufficient property to be covered by the Providence policy.

3dly. That the policy, in this case, being “ for whom it may concern,” covered not only the property of Mr. Jarvis, but also



that of Mr. Preble, who, as prize owner and prize agent, had a right to cause insurance to be made.<sup>1</sup>

4thly. That Mr. Jarvis had a complete property in the vessel and cargo, by virtue of the contract with Preble, in October, 1813, and that the subsequent sale was but a ratification of it.

5thly. That the policy being "at and from," attached upon the *Fame* and cargo at her first arrival at Bergen, in March, 1813; and that the subsequent seizure and detention thereof by the government would have justified an abandonment for a total loss.<sup>2</sup>

\* In reply to the plaintiff's points, *Prescott* and *Hubbard* con- \*136  
tended : —

1st. That a prize agent had not, as such, any right to insure; and, they said, it had never been so adjudged, and that the opinion in 3 Bos. & Pul. Rep. 75, was a mere *obiter dictum*.

2dly. That the defendants had no authority to insure for Preble, but only for Jarvis.

3dly. That if an agent insure, he must insure as such, in the policy.<sup>3</sup>

4thly. That Jarvis had no insurable interest under the contract, in November, 1813, and that he had not even a lien on the property, for it was not then put into his possession.

5thly. That by the words "at and from," the policy did not attach upon the first arrival of the *Fame* at Bergen, but only from the time that some act was done towards fitting her for the voyage to Boston.<sup>4</sup>

<sup>1</sup> 1 Marshall, (Condy's edit.) 97, 108, 112, 113. *Hill v. Secretan*, 1 Bos. & Pul. R. 315.

<sup>2</sup> 1 Marshall, 288, 262, 289. *Hull v. Cooper*, 14 East R. 479. *Bell v. Bell*, 2 Camp. R. 475. *Smith v. Steinbach*, 2 Caines Ca. 158.

<sup>3</sup> *French v. Backhouse*, 5 Burr. R. 2727. 1 Marshall, (Condy's edit.) 297.

<sup>4</sup> 1 Marshall, (Condy's edit.) 261. *Kemble v. Bowne*, 1 Caines R. 75, 79.

STORY J., after stating the facts. The first question is, whose interest is assured by the terms of the policy? The policy was effected by Messrs. Loring and Curtis, for Leonard Jarvis, 3d, or whom the same "may concern." It will, therefore, by its terms cover the interest of L. Jarvis, or any other person, having an interest in the vessel and cargo, who has given an authority for such insurance. There is no warranty or representation of an American character, and the insurance may avail for any foreigner, who has authorized it to be made on his own account.<sup>1</sup> But the insurance cannot enure in favor of any person, who had \*137 an interest in the cargo, unless Messrs. \*Loring and Curtis had an authority from him for that purpose.<sup>2</sup> The letter of instructions, under which this insurance was effected, is now before us, and the construction of it is a question of law. I am of opinion, that it authorized an insurance to be made for L. Jarvis only; and that an insurance for the captors, or for Mr. Preble, was not authorized by it. There is nothing in the letter, which imports, that L. Jarvis is acting as agent for the captors, or for Mr. Preble, in making the insurance. On the contrary, he speaks in reference to an interest, which he had acquired in the vessel and cargo, by virtue of advances, made upon the credit of that fund. And the language in the close of the letter is perfectly satisfied by the obvious interest, that Mr. Preble had, in having an insurance made by Jarvis to the amount of his interest, without supposing that he authorized any insurance directly on his own account. And in respect of proof of an authority to make insurance, I think, that it should not be gathered from loose expressions or inferences in letters of third persons; but it should distinctly appear in some communication between the parties, or their indisputable agents. Assuming, therefore, that a mere

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<sup>1</sup> *Hodgson v. Marine Ins. Co.* 5 Cranch R. 100.

<sup>2</sup> *Steinbach v. Rhinelanders*, 3 Johns. C. 269.

prize agent, as such, has, without any special authority for that purpose, a right to insure for the benefit of the captors,<sup>1</sup> still as that insurance does not appear to have been authorized by such agent, it cannot avail for the captors.

It is argued, that the words "whom it may concern" have no effect, unless they are made to cover the interest of Mr. Preble. If that were true, and they were thus to be deemed mere surplusage, it would not vary the legal result. \* But, in <sup>138</sup> this policy, the words seem to me to have an appropriate use. Under all the circumstances of this case, as the advances were made to Mr. Preble out of the funds of Messrs. Loring and Curtis, by Jarvis, as their agent, by adopting his acts, and making the insurance, it might be, that thereby the interest, whatever it was, that was acquired under the contract, between Preble and Jarvis, might be deemed to be theirs and not Jarvis's. In this view, it might have been a moot point (if the policy had been for Jarvis only) whether he had an interest, to which it could attach; and therefore the words "for whom it may concern" were properly added to cure a doubt; and they are sufficient to cover any interest of Messrs. Loring and Curtis in the vessel and cargo.

The next consideration respects the nature of the interest, covered by the policy. It is on "the brig Fame and her cargo on board." It can, therefore cover no interest except in the vessel and cargo; and the question is, whether Jarvis, or Messrs. Loring and Curtis, were the owners of the vessel and cargo, or of any interest therein.

The original contract between Preble and Jarvis certainly was not intended to convey the general ownership, even admitting that

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<sup>1</sup> *Le Cras v. Hughes*, 1 Marsh. Ins. 84, 108. *Craufurd v. Hunter*, 8 T. R. 13. *Lucena v. Craufurd*, 3 Bos. & Pull. 75. Id. 5 Bos. & Pull. 323. Id. 1 Taunt. R. 325. *Stirling v. Vaughan*, 2 Camp. R. 225. *Routh v. Thompson*, 11 East R. 428.

Preble was the entire owner of the vessel and cargo ; which is certainly not in proof, but, for the purposes of this trial, seems conceded by the parties. That contract was, that the vessel should be put under the control and management of Jarvis, and consigned to Loring and Curtis ; and out of the proceeds of the sale, after her arrival in the United States, they were to pay a bill of exchange, drawn upon them, for their own use. The surplus was to be for the benefit of Preble, or the captors. The utmost interest then, intended in the first instance to be conveyed, was a lien on the vessel and cargo, to the extent of the advances made by Jarvis. To pass the title to a vessel, it is indispensable, \*139 that there should be some written \* transfer of the vessel. This is required by the law of nations, as well as the municipal law of this country. A vessel will not pass by a mere delivery, without a document of sale. The latter is considered as an indispensable muniment of title.<sup>1</sup> And I think, that a lien for general advances cannot be acquired, unless by an hypothecation or other conveyance in writing for this purpose. And if it were otherwise, it is clear, that the lien could not be complete, having a *situs in re*, until possession was acquired under the contract. I should hold, therefore, that no ownership in the vessel was acquired, until the bill of sale to Jarvis in October, 1814, if it were necessary to rest this cause on that point. But it may well be disposed of, even assuming the more favorable position for the plaintiff, that an interest was acquired, as soon as the contract for advances was consummated by an actual possession by Captain Lockwood, in April, 1814.

As to the cargo, a different consideration may, in some respects, prevail. The title may pass by mere delivery of the goods under a contract of sale ; or a lien may be acquired for advances by mere possession under a contract for that purpose. But it is

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<sup>1</sup> *The Sisters*, 5 Rob. R. 155. Abbott on Shipping, ch. 1. p. 1.

of the very essence of a lien on goods, that possession accompanies it. The contract in October, 1813, was clearly executory, both as to vessel and cargo. It was contemplated by the parties, that the interest of Jarvis was to be acquired under a public sale at Bergen of the vessel and cargo, which were to be bought in on his account, and conveyances were to be made to him. Until such conveyances, he was not deemed to be the ostensible owner, nor his control of the vessel complete. And the subsequent agreement and sale, in November, 1814, is perfectly consistent with this construction of the original contract. If, therefore, Jarvis did acquire a lien \* on the vessel and cargo under the con-<sup>\*140</sup> tract for advances, followed up by possession, I think, that he may be rightfully considered as the special owner of them to the extent of these advances ; and as such might protect himself by an insurance to that extent.<sup>1</sup>

The next question is, at what time, if ever, did the policy attach ? The insurance is, "at and from," &c. What is the true construction of these words in policies, must, in some measure, depend upon the state of things, and the situation of the parties, at the time of underwriting the policy. If at that time the vessel is abroad in a foreign port, or expected to arrive at such port in the course of a voyage, the policy by the word "at" will attach upon the vessel and cargo from the time of her arrival at such port.<sup>2</sup> If, on the other hand, the vessel has been a long time in such port without reference to any particular voyage, the policy will attach only from the time, that preparations are begun

<sup>1</sup> *Russel v. Union Insurance Comp.* 4th Dall. R. 421.

<sup>2</sup> *Smith v. Steinbach*, 2 Caines C. 158. *Garrigues v. Coxe*, 1 Binn. R. 592. *Chitty v. Selwyn*, 2 Atk. R. 359. *Cambden v. Cowley*, 2 W. Bl. 417. 1 Marsh. Ins. 262. *Bird v. Appleton*, 8 T. R. 562. *Bell v. Bell*, 2 Camp. 475. *Hull v. Cooper*, 14 East R. 479. *Horneyer v. Lushington*, 15 East R. 46. *Annen v. Woodman*, 3 Taunt. R. 299. *Patrick v. Ludlow*, 3 Johns. C. 10.

to be made with reference to the voyage insured.<sup>1</sup> And if the party insured acquired the ownership subsequent to such time, and before the date of his policy, then the policy will attach only from the time of his acquiring such ownership. If, on the other hand, the ship is at a home port at the time of effecting such insurance, the policy seems generally to be deemed to attach only from the date of the policy.<sup>2</sup>

- \*141 \* In all these cases, the law looks to the known and admitted predicament of the parties at the time of the insurance, and construes the contract with reference to such facts. And a uniform construction of the words, without reference to such circumstances, would often produce the most incongruous and mischievous results.

In the present case, the vessel was in a foreign port, not in the course of a voyage, but moored and stripped, without any destination for any particular voyage. She arrived at that port in March, 1813, and her cargo was about that time unladen. The captors, or their agents, had not, at that time, nor at any other time before the contract with Mr. Jarvis in December, 1813, the slightest intention of undertaking a voyage to Boston. If this policy then were construed to attach from the moment of the first arrival of the *Fame* at Bergen, it would wholly defeat the intention of all the parties to this insurance. The captors or their agents never authorized any such insurance upon their own account; and it would, therefore, be a mere nullity. Neither Mr. Jarvis, nor Messrs. Loring and Curtis had, at that time, acquired any interest in the property; and the assured must have a subsisting interest at the time when the policy, by its terms, would attach, otherwise it will be void for want of an insurable interest. Such an

<sup>1</sup> *Kemble v. Bowne*, 1 Caines R. 75, 79. *Chitty v. Selwyn*, 2 Atk. R. 359. *Gladstone v. Clay*, 1 Maule & Selw. 418.

<sup>2</sup> *Forbes v. Wilson*, 1 Marsh. Ins. 155, 261. *Smith v. Steinbach*, 2 Caines C. 158.

interest, subsequently acquired, would not aid them. And it may be added, that there would have been such a concealment of material facts, whether innocently or otherwise is not important, that the underwriters would have been completely discharged. My opinion is, that under the circumstances, this policy, by its terms, did not attach at the arrival of the *Fame* at Bergen; that it could not attach on the vessel, earlier than the period, in which the assured acquired the special or general ownership of the vessel; nor, if that was previous to the effecting of the policy, until some act was done, or preparation made, with \* reference to the \*142 voyage. If the ownership was acquired subsequently to the date of the insurance, and before preparations for a voyage, the same rule will apply. If while preparations were making for the voyage, the policy will attach only from the time of acquiring the ownership. And in these cases it is always an important inquiry, whether there has been a concealment of facts material to the risk, or a delay in acquiring the ownership, or in preparing for, and sailing on, the voyage, which ought to discharge the underwriter. As to the cargo, it is clear from the terms of the policy, that the policy could not attach on it, until it was actually put on board for the voyage. The word "cargo," *ex vi termini*, means goods on board of the vessel; and in this policy, it is not even on "cargo" generally, but on "cargo on board."

We may now apply these principles to the facts of this case. Assuming that the ownership of the vessel was acquired in April, 1814, by the possession of Captain Lockwood, the policy did not immediately attach on the vessel, but only from the time when preparations were made for the voyage. It is clear from the evidence, that no such preparations were made by Captain Lockwood on his arrival at Bergen. He then found the cargo under the seals of the government; and they refused to allow the cargo to be put on board the vessel, or the vessel to depart from the port. No sale of the vessel was ever made by him, by public

auction, so as to constitute Mr. Jarvis the ostensible owner ; and, in the autumn of 1814, having obtained leave, he sold the white linens by public auction, and bought them in for Mr. Jarvis, and then proceeded to sell them on his account by retail. When Mr. Jarvis arrived at Bergen, in November, 1814, he confirmed these acts of Lockwood, ratified the sale of the brown linens to the government, and totally abandoned all further thoughts of the \*143 voyage. The very substratum of the voyage, the whole \*cargo of linens, was voluntarily disposed of ; and it was not until his second return to Bergen, in March, 1815, when the brown linens were returned by the government, and after having two other voyages in view, that Mr. Jarvis concluded to resume the original voyage to Boston. Preparations for this purpose were made in May, 1815, and the cargo was then, for the first time, put on board.

Under these circumstances, the policy did not attach on vessel, or cargo, until that time. There is no pretence, that this delay was justified by necessity ; and therefore the underwriters could not have been held under the policy. In fact, as to them, there was a complete non-inception of the voyage insured. It was not a deviation, for that supposes the voyage to have commenced. But there was a delay, which, to all intents and purposes, made the voyage a new one, which they never had insured. The very representation, under which they had underwritten, was of a voyage immediately to be performed, and not of a voyage to commence in *futuro*, at any period when it might suit the convenience of the assured to prosecute it.

But there is another point, which, if the evidence be believed, and it is exceedingly strong, and, as far as I recollect, perfectly uncontradicted, completely disposes of the cause, let the other points be as they may. It is the point, that there was an over-insurance before the date of the present policy, the whole interest being, as it is asserted, but \$38,240.32, and the whole prior in-



insurance being \$43,700. If the jury are satisfied, that such is the fact, then it is my opinion, that the present policy never attached, for want of a subject matter, upon which it could operate, notwithstanding the prior policies were cancelled or defunct, before the risk commenced.

The prior policies were all underwritten upon the same voyage, and in the same terms; their priority, therefore, was according to their respective dates, and nothing done \*by the parties to those \*144 policies, after the execution of the present policy, could alter the relative situation of the parties to this policy. The rights of the latter were fixed by the terms of their own contract. The memorandum, therefore, entered upon the prior policies in December, 1814, by which those policies, from non-compliance with the warranty, were discharged on the second day of February, 1815, before the risk commenced, has no effect upon the present policy. And, as between the parties in the present suit, those policies are to be considered in the same manner, as if no such memorandum or cancellation had ever been made. It is not competent for the assured thus to change the legal predicament of the underwriters on a policy. The clause in this policy, referring to the effect of prior policies, is perfectly unambiguous in its terms. When it speaks of the property's being assured by policies "actually prior to this" policy, it speaks with reference to such policies, as subsisted at the real date of this policy. It does not refer to any subsequent acts or agreements between the parties, by which those policies might, or might not, attach upon the subject matter. If the property, which the assured has in the subject matter of insurance, would be completely covered by those policies, supposing them still in existence, it is quite immaterial to the subsequent underwriters, whether the assured choose to hold or release those policies. The language of the clause, as to subsequent insurers, manifestly refers their responsibility to the date of their policies, and confirms the construction, which has

seen stated. Upon any other construction great inconveniences and even frauds might arise ; and in case of a subsequent increase of risk, there would be great temptations for prior underwriters to collude with the assured, and discharge themselves, and charge the subsequent insurers. All that is required by the terms of the contract is, that the property should be wholly assured by a prior \*145 insurance \* for the same voyage. But whether that insurance ultimately protects the party, or not, is a question, with which the contract does not at all intermeddle.

I do not think it necessary, considering the predicament of this case, to press another point, which has been made at the argument. From the terms of the policy, the vessel is warranted to be an English prize vessel ; and if, by changing her colors and documents, and giving her a Swedish character, before the policy attached, the risk was materially increased, the underwriters were completely discharged.

The jury found a verdict for the defendants.

After the verdict, *Townsend*, for the plaintiff, moved for a new trial on account of a misdirection of the Court upon the point, as to the effect of the memorandum upon, and cancellation of, the prior policies. He argued, that the prior policies were by the memorandum and subsequent non-compliance with the warranty contained therein, completely removed on the second day of February, 1815, long before this policy, according to the construction given by the Court, attached either to vessel or cargo. Under these circumstances, the case was the same, as if those policies had never been underwritten. The clause in the policy, as to prior insurances, refers only to insurances "actually prior," where the risk shall have actually attached, and not to the date of the policy. If the risk has not commenced, the prior policies may at any time be removed, and the subsequent policies will attach, as if there had not been any

others in existence. The terms "actually prior" mean, not actually prior in point of time, but in attaching upon the subject matter.

\* *Prescott* and *Hubbard*, for the defendants contended, that<sup>\*146</sup> the construction, put upon the clause by the Court, was the correct one. Great inconveniences and frauds would arise upon any other construction. This clause was first introduced about thirty years ago, in consequence of the adoption of the English rule as to contribution, in a case in which Mr. Cabot was a party. The construction has uniformly been, that the priority is from the real dates of the policies; and it would be strange indeed, if the acts of third persons should vary the legal predicament of the parties.

STORY J. I remain of the same opinion, which was expressed at the trial, upon the point now in question. Every subsequent reflection has confirmed me in the belief of the correctness of that opinion. There is no case in the books, in which this point has come solemnly in judgment; but it seems to have been taken for granted in various discussions of Courts of Law, that the construction for which we contend, was the true one. Mr. Justice *Kent* has sufficiently stated the true meaning of the clause.<sup>1</sup> An insurance, prior in date, is to exonerate the underwriter, and entitle the assured to a return of premium; an insurance, subsequent in date, is to have no effect at all upon the present policy.<sup>2</sup>

On the whole, the District Judge concurs with me in the opinion, that the motion for a new trial must be overruled.

*Motion overruled.*

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<sup>1</sup> *New York Ins. Co. v. Thomas*, 3 Johns. C. 1.

<sup>2</sup> *Lee v. Mass. Fire and Marine Ins. Co.* 6 Mass. R. 208. *Brown v. Hartford Ins. Co.* 3 Day R. 58.

## \* UNITED STATES v. JAMES SMITH AND OTHERS.

An endeavour to make a revolt within the Act of 30th of April, 1790, ch. 9, sect. 12, is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship.

A vessel lying on the sea, outside of the bar of a harbour of the United States, within three miles of the shore, is on the high seas.

A voyage in shipping articles from A to B, or some other port, for a cargo of salt, and return to the United States, is not ended on arrival at the first port of the United States, unless it be the port of discharge.

**INDICTMENT** against the defendants for an endeavour to make a revolt in a ship on the high seas, contrary to the 12th section of the statute of 30th of April, 1790, ch. 9.

The cause was argued by *George Blake* for the United States, and *S. L. Knapp* for the defendants.

**STORY J.**, after summing up the facts, delivered the opinion of the Court as follows : —

The language of the statute is not of very easy interpretation ; and the word “ revolt ” has not acquired so definite a meaning, as to be free from all doubt. After the best consideration, which we can give the subject, we are of opinion, that an endeavour to make a revolt in a ship is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers of the ship. A mere act of disobedience to a lawful command of the officers, is not, of itself, an endeavour to make a revolt. But to amount to the offence, it must be combined with an attempt to excite others of the crew to a general resistance or disobedience of orders, or a general neglect and refusal of duty. So if there be an endeavour to usurp the command and government of the ship,

by combining the crew in hostility \* against the master and officers, this is properly an endeavour to make a revolt. We do not mean to assert, that the offence cannot be committed, unless by an attempt to stir up a general resistance or usurpation of the authority of the officers in all cases. If the crew were to combine together to resist a single lawful order of the master, or to compel him by force to yield up his authority in a single case, and were to proceed in the execution of their purpose, all their acts, done towards its accomplishment, might perhaps be properly deemed endeavours to make a revolt. What we mean to assert is, that the endeavour to make a revolt necessarily implies an attempt to stir up others of the crew to a resistance or rebellion against the lawful authority of the master and officers; and that the offence is not committed, if the party does not attempt or endeavour to combine, or excite others of the crew, to aid in his unlawful purposes.

Another question has arisen, whether the offence if committed at all, was in this case committed on the high seas. It appears, that the vessel at the time of the supposed offence was lying outside the bar of Newburyport harbour, but within three miles of the shore. Under these circumstances we are clearly of opinion that the place, where she then lay, was on the high seas; for it never has been doubted that the waters of the ocean, on the sea-coast, without low-water mark, are the high seas.†

Another question is, whether the voyage was ended at the time of the supposed offence, so as to discharge the mariners from their service. The voyage by the shipping articles is, "from Newburyport to the Cape de Verd Islands, or some other port, for a cargo of salt, and return to the \* United States." \*149

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† *Quære* if it be necessary to allege this offence to be committed on the high seas, as the statute does not seem to make it local? Vide the 12th section of the Act of 1790, ch. 9.

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The Octavia.

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The vessel on her return voyage anchored in the outward harbour of Boston, and was immediately ordered round to Newburyport, (the port to which she belonged,) to discharge her cargo. Upon the construction of the shipping articles we are of opinion, that the voyage did not end at the arrival at the first port in the United States, nor until an arrival at the port of discharge in the United States.

*Verdict against the defendants.*

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THE SHIP OCTAVIA, WILLIAM NICHOLS AND OTHERS  
CLAIMANTS.

In proceedings *in rem*, upon a bond for the appraised value given jointly and severally, if one of the obligors dies, the Court will proceed against the survivors, or, at the option of the plaintiffs, against the representative of the deceased also.

THE ship Octavia was condemned in the Circuit Court, as forfeited to the United States, and that decree was affirmed in the Supreme Court, and a mandate directed to the Circuit Court to proceed to a due execution of the decree. The ship, pending the suit, was delivered to the claimants, upon their giving a joint and several bond with surety for the appraised value with the usual condition.

After the affirmation of the decree, Nichols, one of the claimants, deceased; and the District Attorney at this Term, with a view to relieve the surety, prayed for a monition against the administrators of the intestate, to show cause why a summary judgment should not be rendered against them upon the bond aforesaid. The monition was accordingly granted, and at the return day the administrators did not appear, but made default.

\*150 \* And now, the District Attorney prayed the Court to grant separate judgments and executions upon the bond aforesaid

against the administrators, and also against the other parties to the bond. The Court, considering this as a new point, in respect to which the practice had not been settled, took time to consider ; and afterwards the opinion of the Court was delivered as follows.

**STORY J.** The bond in this case is joint and several, and being taken in a proceeding on the Instance side of the Court, it is to all intents and purposes a stipulation in the Admiralty. It was not from any doubt entertained upon the subject, but simply with a view to consider, what ought to be the practice, that we took time to advise.

When any one of the parties to a bond, or stipulation, dies, pending the proceedings, there is no doubt, that this Court may, by monition, proceed against the administrators or executors of the deceased. The 31st section of the Act of 1789, ch. 20, applies more immediately to suits *in personam* ; but, if it were necessary, we should think, that its equity extended to this case. It is not, however, necessary to place this point upon that statute ; for independent of any positive acts, the Court has a right, in the exercise of its general Admiralty jurisdiction, to reach the effects of the deceased in the hands of his representative. In this case it is at the option of the Attorney for the United States to take his separate judgments and executions against the surviving parties to the bond ; or to proceed simultaneously against the administrator of the deceased obligor. One satisfaction only, however, can be taken upon the executions. If the surety in this case will bring the money into this Court, subject to its order, we will, with the assent of the District Attorney, in the exercise of the equitable jurisdiction of the Admiralty, allow him to proceed against the principals in the bond and their \* representatives, in \*151 the name of the United States, to enforce his indemnity.

*G. Blake* for the United States.

*Prescott and Gallison*, for the surety.

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 United States v. Brown.
 

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## UNITED STATES v. GEORGE BROWN.

On an indictment upon the Act of 16th of March, 1802, ch. 9, § 19, for purchasing of a soldier "his arms," it must be proved, that the soldier was in the lawful possession of the arms, or had a special bailment of them, otherwise the indictment cannot be sustained. If the arms were *stolen*, the case is not within the Act.

**INDICTMENT** against the defendant for purchasing a soldier's arms, against the Act of 16th of March, 1802, ch. 9, § 19.

Upon the trial, the evidence was, that the defendant purchased a musket from a soldier, knowing him to be such, and that the soldier claimed the arms as his own. But it also appeared, that the musket was not lawfully in the possession of the soldier, but had been stolen by him from the arsenal of the United States, at Charlestown.

**STORY J.** The Act of Congress declares, that every person, who shall purchase from a soldier his arms, uniform, clothing, or any part thereof, shall, on conviction, be liable to a limited fine or imprisonment, at the discretion of the Court having cognizance of the offence. To bring the case within the statute, it is not necessary, that the arms should be strictly the absolute property of the soldier; for then the Act would have no effect, as the arms used by the soldiers in the public service belong to the United States. It is sufficient, if the soldier have a special  
 \*152 property therein by a bailment in the course of the \*service; or have a lawful possession, using them as his own in the duties of the service. But if his possession be unlawful, or obtained by larceny, the arms are not in the sense of the Act, "his arms." It may be a blot in the Act (and unfortunately there are many blots in our criminal code) but it is competent only for the legislature to cure the defect.

*Verdict for plaintiff.*

*G. Blake* for the United States.

*Wm. Austin* for the defendant.



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United States v. Hamilton.

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## UNITED STATES v. JAMES HAMILTON.

Larceny committed on board an American ship, in an enclosed dock, in a foreign port, is not punishable under the statute of 30th of April, 1790, ch. 9, § 16.

**INDICTMENT** for a larceny on the high seas against the Act of 30th of April, 1790, ch. 9, § 16.

Upon the trial it appeared, that the supposed larceny was committed on board the American ship *Augusta*, while she lay in an enclosed dock, in the port of Havre in France, into which dock the water was admitted only at the will of the owners.

**STORY J.** Upon this evidence the indictment is not maintained. The place, where the ship lay, was in no sense "*the high seas*." The Admiralty has never held, that the waters of havens, where the tide ebbs and flows, are properly the high seas, unless those waters are without low-water mark. The Common Law has attempted a still more narrow construction of the terms.

*Verdict for the defendant.*

*G. Blake* for the United States.

**\* ABNER STEARNS IN ERROR v. WILLIAM BARRETT.**

The proceedings under the 10th section of the Patent Act of 21st of February, 1793, ch. 11, are in the nature of a *scire facias* at the common law, to repeal a patent.

Upon a judgment rendered on such a suit, error lies to the Circuit Court.

A verdict, which is repugnant or uncertain in a material point, is void.

The refusal of a Court to amend a verdict is not matter, which can be assigned for error.

Upon a trial under the general issue, under the 10th section of the Patent Act, the burden of proof, that the patent was obtained surreptitiously or upon false suggestion, lies on the plaintiff.

If a patent has been obtained by the plaintiff, upon the defendant's refusal to submit to an arbitration, according to the provisions of the 9th section of the Patent Act, and the defendant subsequently obtain a patent for the same invention, this is not *conclusive* proof, that the latter was obtained surreptitiously or upon false suggestion.

**T**HIS was a proceeding in the District Court, under the 10th section of the Act of the 21st of February, 1793, ch. 11, to repeal a patent-right, granted to the defendant upon the allegation, that it was obtained surreptitiously and upon false suggestion. Upon a motion, supported by affidavit, a rule to show cause, why process should not issue to repeal the letters patent, was granted; upon the return of which the District Court, after hearing the parties, made the rule absolute; and process was ordered by the Court to issue against the defendant, to show cause *why the letters patent should not be repealed*; and it was further ordered, that the applicant should file his allegations with due specifications. A further allegation, with specifications, was accordingly filed, by way of amendment of the original complaint, and thereupon the said process duly issued. The original affidavit alleged, that the letters patent were obtained surreptitiously and upon false suggestion; and that the plaintiff was the true and original inventor of the machines in controversy.

The amended complaint alleged, that the machines described in the letters patent to the defendant, "were not invented by him,

but by another." And after specifying, \* under a *videlicet*, the particulars of the invention, and alleging, that they were not invented by the defendant, concluded by alleging, "that the same machines, in all respects, in which they are new, are and were of the invention of another; and were known, and secured by patent, previously, to the complainant, as in and by his specification or affidavit originally filed, to which this is an amendment and addition, is alleged." Upon the return of the process, the defendant duly appeared and filed the following plea and answer. "And now the said Barrett comes and defends, &c. when, &c., and for cause, why the said letters patent should not be repealed, saith, that his letters patent were not upon false suggestion or surreptitiously obtained, in manner and form as set forth in the writ of said Stearns; but that the said new and useful improvement, for which his said letters patent issued, as in said complaint is set forth, was invented by him, the said Barrett, in manner and form as he, in his former answer to the first complaint of said Stearns, hath alleged, and thereof he puts himself upon the country." And the plaintiff put himself, as to this issue, upon the country likewise.

The issue, so joined by the parties, was tried by a jury, who returned the following verdict: "The jury agree, that the plaintiff and defendant were both concerned in the invention of the reel, or machine, for dying all kinds of woven and silk goods, and a frame for finishing the same. They find, that the plaintiff has not supported his allegations, and therefore find a verdict for the defendant." Upon this verdict a judgment was rendered by the Court, by consent of the parties, for the defendant. At the trial, a bill of exceptions was taken by the plaintiff to the charge of the Court. The bill of exceptions stated, at large and *in hæc verba*, the testimony of all the witnesses on each side, and all the other evidence introduced by the parties. It then stated the points insisted upon by the Counsel, and \* then the charge of the \*155

Court upon these points as follows : " Whereupon the said Counsel for the complainant insisted then and there before the said Hon. Judge, on the behalf of the said Stearns, that the said several matters, so produced and given in evidence on the part of the said complainant as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, that the said Barrett had surreptitiously obtained his said patent, and was not the inventor of all the essential parts of the said machines. The said Counsel particularly insisted, that the refusal of the said Barrett, in the manner disclosed in the evidence aforesaid, to appoint an arbitrator on his part, in compliance with the requirement of the law of the United States, in such case provided, and his, the said Barrett's obtaining his said patent afterwards, in the manner disclosed in the evidence aforesaid, was contrary to the Statute in such case ; and thereupon the said Counsel for the complainant prayed of the said Hon. Judge to admit and allow the said matters so as aforesaid produced and given in evidence to be conclusive evidence, that the said patent of the said Barrett was obtained surreptitiously. The Counsel for the complainant farther insisted, that, as to the invention of the said machines, it was incumbent on the complainant to produce only general evidence to show, that said Barrett was not the inventor ; and that the burden of evidence thereupon devolved on the respondent ; and it became incumbent on him to prove, that he, the said respondent, was the sole and exclusive inventor of all, and every essential part of the said machines respectively, as set out and described in his specification ; and thereupon the said Counsel prayed the Hon. Judge to admit and allow the evidence aforesaid to be conclusive, that the patent of the said Barrett was obtained upon false suggestion, and to instruct and direct the Jury, that unless the said Barrett had proved, beyond a reasonable doubt, that he

\*156 was the sole and \* exclusive inventor of all the essential parts of the machines aforesaid, described in his specification, and stated

in his patent, that they, said Jurors of the Jury aforesaid, should return a verdict for the complainant.

But to this the Counsel for the respondent, on his behalf, did then and there insist before the said Hon. Judge, that the matters and evidence aforesaid, so produced and proved as aforesaid, did not amount to, nor ought to be held to be, conclusive evidence against the said Barrett to prove, that his patent aforesaid was obtained surreptitiously or upon false suggestion as aforesaid.

And the said Hon. Judge did then and there declare and deliver his opinion to the Jury aforesaid, as follows, namely: As to the first point the Judge directed the Jury, that though it should appear to them from the evidence, that there were conflicting claims for a patent by the respective parties, at the office of the Secretary of State, and that a reference was recommended or directed, and that said Stearns did offer to refer such conflicting claims of himself and said Barrett to arbitrators, to be appointed according to the provisions of the law in such case, and named an arbitrator or referee on his behalf, and gave notice thereof to said Barrett; and though said Barrett should have refused, on his part, to appoint an arbitrator or referee, and afterwards a patent was issued to Stearns, and, subsequent to the date of said Stearns' patent, one was issued to said Barrett, as appears in evidence from their respective dates; yet that these circumstances alone would not constitute an obtainment of the patent surreptitiously, or on false suggestion, on the part of said Barrett, within the true intent and meaning of the Statute; and that other evidence besides that, which should establish those facts and circumstances, would be necessary to support the charge of obtaining the patent surreptitiously or by false suggestion. And in regard to the second point, the \*said Hon. Judge directed the Jury, that the bur- \*157 den of proof lay upon the complainant to support his allegations, in order to maintain the issue joined; and that as to the question, who was the true inventor of the machines, in was incumbent on

the complainant to satisfy the Jury, beyond a reasonable doubt, that said Barrett was not the true inventor of said machine or improvement, or of some essential part of it, to maintain that alleged ground for vacating the respondent's patent. That the objection, that this was requiring the complainant to prove a negative, was not applicable to this direction; for the complainant might prove the proposition contended for, by proving that another person, besides Barrett, was the inventor; and as there appeared no allegation nor evidence in the cause, nor was it contended by either party, that any other, besides Stearns and Barrett, was the inventor of said machine, it would follow, that unless Stearns should have satisfied the Jury, that he was the inventor of the machine, or some material part of it, they must find a verdict for the respondent; and with this direction, the said Hon. Judge left the cause to the Jury."

The following points were now made by *G. Sullivan*, for the plaintiff in error.

1st. That by the finding of the Jury, the fact was expressly established, that the respondent was not the sole inventor of any essential part of either of the machines, for which he obtained a patent; and the conclusion of the verdict in favor of the respondent was therefore repugnant to this finding, and contrary to law.

2dly. That the Hon. Judge ought to have amended and worked said verdict into form, and thereupon entered judgment for the complainant, or have rejected it, and awarded a *venire de novo*.

3dly. That the Hon. Judge directed and decided, that it was \*158 incumbent on the complainant to prove a negative \* proposition, viz. That the respondent was not the inventor of the essential parts of said machines, whereas the respondent ought to have been held to prove, that he was the inventor.

4thly. That the Hon. Judge directed and decided, that the obtainment, by the respondent, of his said patent, was not surreptitious, although obtained in the manner apparent on the record, viz. after a patent, for the same invention, had been issued to another, upon the refusal of the respondent to submit to arbitration, as required by the ninth section of the patent law.

5thly. That the answer of said respondent, under oath, was read to the Jury in evidence.

Under the first point it was contended, that whenever a patentee had obtained a patent upon a specification broader than his invention, the patent was void. As when a patent was obtained for the whole of a machine, and the patentee had invented only an improvement.<sup>1</sup>

So where the specification imperfectly discloses the mode of producing the effect; or specifies an effect, which the means specified will not produce, the patent is void.<sup>2</sup>

And if the patent obtained really covers the invention of another, it is void.<sup>3</sup>

Under the second point it was contended, that it was within the power of a Court to amend a verdict. And that this might be done by the plea-roll, issue, notes of the Judge, minutes of counsel, or affidavit of facts, proved at the trial.<sup>4</sup>

\* As where the Jury find a fact, of which there was no<sup>\*159</sup> evidence.<sup>5</sup>

Where the Jury use technical terms, in an improper manner.<sup>6</sup>

<sup>1</sup> *Woodcock v. Parker*, 1 Gall. R. 438.

<sup>2</sup> *Turner v. Winter*, 1 T. R. 602. *Rowntree's case*, Fessenden's Law of Patents, 151.

<sup>3</sup> *Tenant's case*, Fessenden's Law of Patents, 152.

<sup>4</sup> *Goodlittle v. Otway*, 8 East R. 357. *Doe v. Perkins*, 3 T. R. 749. *Petrie v. Hannay*, 3 T. R. 659. *Pres., Direct., and Co. of the Highland Turnpike v. Mc Kean*, 11 Johns. R. 100, 101. *Grant v. Astle*, Doug. R. 723.

<sup>5</sup> *Manners v. Postan*, 3 Bos. & Pul. R. 343.

<sup>6</sup> *Chester v. Wellan*, 2 Saund. R. 97.

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Stearns in Error v. Barrett.

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Where the Jury undertake to collect the contents of a deed, and find the deed in *hæc verba*, the Court will not regard the jury's finding of the contents, but will look to the deed.<sup>1</sup>

Where the Jury undertake to find the costs for either party, of which the law disposes, the Court will not regard the finding.<sup>2</sup>

Where the Jury find the plaintiff was disseised *nisi* the words contained in a will conveyed a good estate; the Court held, that the verdict was perfect without the *nisi*, and so entered for the plaintiff.<sup>3</sup>

Where the Jury find, that the defendant did not promise, &c. nevertheless if two witnesses are to be believed, and they think they are, they find the verdict for the plaintiff; it was held a good verdict for the defendant.<sup>4</sup>

Where the Jury find the facts at large, and further conclude against law, the conclusion is ill, and the verdict will be amended according to the facts found.<sup>5</sup>

Where the Jury bring in a verdict, and there is surplusage, the Court will reject the surplusage.<sup>6</sup>

Where the Jury find any thing out of the issue, such a verdict, \*160 for so much, is void, although it conclude in general \* for or against the plaintiff or defendant. And the rule, by which the Court shall amend verdicts, is the true legal intent and meaning of the Jury, if such may be collected from the verdict.<sup>7</sup>

It was then contended, that the verdict in the case before the Court, was, in substance, a sufficient and distinct answer to the

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<sup>1</sup> *Row v. Huntington*, Vaug. R. 77.

<sup>2</sup> *Green v. Cole*, 2 Saund. R. 257.

<sup>3</sup> *West v. Tonson*, Cro. Eliz. 480.

<sup>4</sup> *Sir Rowland Haywood's case*, 3 Dy. 371.

<sup>5</sup> Dy. 106, 20. Pl. Com. 114. 11 Rep. 10. *Priddle's case*.

<sup>6</sup> 11 Mod. 64.

<sup>7</sup> *Foster v. Jackson*, Hob. R. 54. *Hawks v. Crofton*, 2 Burr. R. 699. *Doe v. Perkins*, 3 T. R. 749. *Rees v. Morgan*, Id. 349. *Walker v. Gibbs*, 2 Dall. R. 211, 212.



issue, and defective only in form ; and that the Judge should, therefore, have amended it, or, since the verdict was no part of the record, have entered up judgment for the plaintiff, without amending it.

Under the third point, it was contended, that a *scire facias* was a summary remedy, in the nature of a *quo warranto* ; and was sustained at Common Law, where the subjects were injured by a patent, in order to avoid a multiplicity of suits. That in a *quo warranto*, the respondent must set out his whole title at length, and that the affirmation necessarily devolved upon the respondent, by the whole course of the pleadings ; that this process was in the nature of a *quo warranto*, and the whole course of proceedings was the same.

Under the fourth point, it was contended, that by the ninth section of the patent law, the legislature had prescribed a mode for the adjustment of interfering applications by a reference ; and that if an applicant, refusing to submit to such reference, was permitted still to obtain a patent, all the advantages to be derived from a patent, which was that of an exclusive privilege, would be lost to the other patentee.

Under the fifth point it was contended, that to permit the answer of the respondent on oath to be read to the Jury in evidence, was contrary to the course of proceedings in a *quo warranto*, and was not, therefore, allowable in this case.

\* *Bigelow* and *Gorham*, for the defendants, contended that a \*161 writ of error would not lie in this case, because the process was not according to the course of the Common Law.<sup>1</sup>

That if it were according to the course of the Common Law, it would be necessary for the complainant to allege himself to be

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<sup>1</sup> *Hunt v. Coffin*, Dyer R. 197. *Melvin v. Bridge*, 3 Mass. R. 305. *Pratt v. Hall*, 4 Mass. R. 241. *Edgar v. Dodge*, 4 Mass. R. 671.

the first patentee, and to set out his right at length, which the complainant, in this case, had not done.

That the burden of proof was on the complainant, and he must show, that the patent of the defendant was obtained surreptitiously and upon false suggestion; the patent obtained by the defendant being, in itself, *prima facie* evidence of his right.

That the writ of *scire facias* was a judicial writ founded upon a record; but that, in this case, there was no record to found the process upon, the District Court not being the repository of the records of patents; and no process of this kind could have issued from that Court, had not a special power been given to it by the patent law.

That the proper mode of procedure would have been by a *certiorari*, which being a writ of favor, the truth of the facts and the merits of the case would have been examined under it.

It was further contended, that the finding of the Jury in this case was not, that this was a joint invention of the plaintiff and defendant, but only, that both of them were concerned in it; similar to the case of the invention of a machine by two men without either's knowing of the invention of the other; in which case it could not by any means be said, that the patent of the last inventor was obtained surreptitiously. If, therefore, the \*162 finding of the Jury could \*by any means be made consistent, the Court would make it so.

STORY J. The first question is, whether this Court has appellate jurisdiction from a judgment, rendered by the District Court in proceedings under the tenth section of the Patent Act.

Before considering this question, it will be necessary to settle the true nature and character of the proceeding itself. It is not easy to give a construction to the tenth section of the Act, that is entirely free from difficulties. It provides, in substance, that, upon oath or affirmation being made before the Judge of the

District Court, that any patent was obtained surreptitiously, or upon false suggestion, and motion made to the said Court within three years after issuing the patent, it shall be lawful for the said Judge, if the matter alleged shall appear to him sufficient, to grant *a rule*, that the patentee, or the executor, &c., *show cause*, why process should not issue against him to repeal such patent; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute; and thereupon the said Judge shall order process to be issued against such patentee, or his executors, &c., with costs of suit. And in case no sufficient cause shall be shown to the contrary; or if it shall appear, that the patentee was not the true inventor or discoverer; judgment shall be rendered by such Court for the repeal of such patent. And if the party, at whose complaint the process issued, shall have judgment given against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed against him by the Court, and recovered in the due course of law.

The proceeding is evidently of a peculiar nature. It begins by a rule to show cause, which is commonly called a rule *nisi*, and if no sufficient cause be shown to the \*contrary, the rule is \*163 to be made absolute. For what purpose is it to be made absolute? Clearly, as the Act declares, that process may issue against the patentee to repeal the patent; and the section proceeds to direct, that such process shall be issued against the patentee, with costs of suit. If the section had stopped here, there could have been little room for doubt; and it would, probably, have been judicially held, that the hearing upon the rule was decisive, and final between the parties; and that if the rule was made absolute, the patent would be in effect repealed; and the issuing of process would be in the nature of an execution to enforce, or make known, the judgment of the Court. The proceedings would, in this view, bear a strong analogy to the summary proceedings under the statute of 17 Geo. 3, ch. 25, to

set aside an annuity and cancel the bond, or other assurance, granting the same.<sup>1</sup> In aid of this construction of the tenth section of the patent Act, it is material to observe, that, by its terms, the process is to be issued to repeal the patent, and not to show cause, why it should not be repealed; and the process is also to enforce a payment of the "costs of suit," which seems to suppose, that the suit is then concluded.

But it has been supposed, that the subsequent clauses of the tenth section contemplate the process to be issued as merely interlocutory process, to bring the party into Court to show cause, why the patent should not be repealed; and that, upon the pleadings upon such process, the merits of the application are to be discussed and decided. And the clause, that "in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such Court for the repeal of such patent," is supposed particularly to apply to those ulterior  
 \*164 proceedings. \* In fact, the process is thus deemed, to all intents and purposes, a *scire facias* at the Common Law to repeal a patent.

There is certainly great force in the argument in support of this view of the process, although some differences must be admitted to exist between it and a *scire facias* at the Common Law to repeal a patent. In the first place, a *scire facias* is a judicial process, issuing upon some record already enrolled in the Court. It either issues out of Chancery, where the patent itself is recorded, or from some other Court, where a forfeiture or other cause of repeal appears by office, or other matter upon record, in the same Court.<sup>2</sup> And the patent itself, or an inquisi-

<sup>1</sup> 1 Tidd. Pr. 436, (4th edit.)

<sup>2</sup> *The King v. Butler*, 3 Lev. R. 220. S. C. 2 Vent. 344. 4 Inst. 72. 2 Saund. R. 72, p. 9 in note. 1 Tidd. Pr. 966, (4th edit.)

tion, which finds a patent and a cause of forfeiture, is a sufficient record to authorize the issuing of the *scire facias*.<sup>1</sup> In this respect, the process from the District Court is different. That Court is not the depository of the records of patents; but they are recorded in the office of the Secretary of State; and, if the present argument be right, the process is not founded upon any judgment of the Court, ascertaining a forfeiture or ground of repeal. In the next place, a *scire facias* is a process altogether confined to the Crown, with the exception of the single case, where two patents have issued for the same thing; in which case, the prior patentee may maintain a *scire facias* to repeal the second patent.<sup>2</sup> But, under our patent Act, any person, whether a patentee or not, may apply for the repeal. There are other differences, which it is not now necessary to enumerate.

\* After considerable hesitation, I have come to the conclusion, \*165 that the proceedings upon the rule *nisi* are not conclusive; and that the process, to be awarded upon making the rule absolute, is not a final process, but a judicial writ in the nature of a *scire facias* at the Common Law. In this view, the preliminary proceedings are analogous to those on a rule for an information in the nature of a *quo warranto* under the English statutes.<sup>3</sup> Upon this construction all the words of the statute have a natural connexion and distinct meaning, referring to the progressive order of the proceedings. The process is called in the statute a process to repeal the patent, merely as a description of its nature and use; and not because it necessarily and absolutely, *per se*, repeals the patent; in the same manner as a *scire facias* at Common Law, though, in fact, always a process to show cause,

<sup>1</sup> Lev. 220. Com. Dig., *Patent*, F, 7. Dy. 197, &c.

<sup>2</sup> Dy. 198, 6. 2 Saund. 72, 8, note. Com. Dig., *Patent*, F, 2, F, 3; but see 6 Mod. 229.

<sup>3</sup> See *Rex v. Dawes*, 4 Burr. R. 2022. *Rex v. Dawes*, 4 Burr. R. 2120. *Rex v. Peacock*, 4 T. R. 684.

is generally denominated a *scire facias* to repeal a patent.<sup>1</sup> Nor does the addition of the words in the statute, "with the costs of suit," at all impugn this construction; for the process is then to show cause, why the patent should not be repealed, with costs of suit. In confirmation of this construction it may be remarked, that in the correspondent section of the patent Act of 10th of April, 1790, ch. 7, the clause as to the costs of suit is omitted; which clearly shows, that these words ought not to change the ordinary construction of the context. The subsequent language of the section, that "in case no sufficient cause shall be shown to the contrary, or if it shall appear, that the patentee was not the true inventor or discoverer, judgment shall be rendered by such Court for the repeal of such patent," manifestly contemplates

\*166 some proceedings after the process is issued, by \* which certain facts may be judicially determined, which are to be the proper foundation of a judgment. It is also of very considerable weight, that this has been, as far as we can obtain information, the practical exposition of the statute. It is consonant to the rules of the Common Law, which have generally been consulted and followed in all our laws and proceedings, to which they bear any relation; and it preserves the trial by jury, which the judicial Act<sup>2</sup> declares shall be the mode of trial of all issues of fact in the District Court, in all causes except civil causes of admiralty and maritime jurisdiction. Whether a more convenient, as well as a more effectual remedy, might not have been obtained by a bill in equity, to set aside a patent for fraud or imposition, it is not the province of a judicial tribunal to consider or decide.<sup>3</sup>

It being then ascertained, that this is a proceeding in the nature of a *scire facias* at the Common Law, the next inquiry is,

<sup>1</sup> Dyer R. 179, b, 198, a. Lilly's Entr. 411. 2 Saund. R. 72, p, note.

<sup>2</sup> Act 24 Sept. 1789, ch. 20, § 2.

<sup>3</sup> See *Attorney General v. Vernon, &c.*, 1 Vern. R. 277, 370.

whether this Court has appellate jurisdiction from the judgment rendered therein by the District Court.

If this point were to be decided by a mere reference to the Common Law, no difficulty could arise ; for, upon a judgment on a *scire facias*, it is very clear, that error lies.<sup>1</sup> But the appellate jurisdiction of the Circuit Court depends altogether upon the positive provisions of our own statutes. It is not a Court, originating in the Common Law, whose jurisdiction is to be ascertained by immemorial usage. The Judicial Act of 1789, ch. 20, § 22, gives appellate jurisdiction to this Court from all final decrees of the District Court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds 300 dollars ; and from all final decrees and judgments, "in civil actions," where the matter in dispute exceeds 50 dollars. The Act \* of 3d March, 1803, ch. 93, § 2, allows an appeal to \*167 this Court from all final judgments or decrees of the District Court, where the matter in dispute exceeds 50 dollars. Whether this last statute applies to any but causes of admiralty and maritime jurisdiction, is questionable,<sup>2</sup> and need not now be considered ; for this process comes completely within the description of a "civil action." A *scire facias* is a judicial writ ; and yet it is held to be an action, because the defendant may appear and plead thereto.<sup>3</sup> And for precisely the same reason this process must be deemed an action ; and it is clearly a civil, as contradistinguished from a criminal, action. A writ of error, therefore, well lies, if the matter in dispute exceeds the stipulated value. It is conceded by the counsel on both sides, that

<sup>1</sup> 2 Tidd. Pr. 966, 1028. Com. Dig., *Pleader*, 3, B, 7.

<sup>2</sup> *United States v. Wonson*, 1 Gall. R. 5, 11.

<sup>3</sup> Co. Lit. 290, 6, 291, a. *Pultney v. Tonson*, 2 W. Bl. R. 1227. *Guy v. Jones*, 2 Wils. R. 251. *Fenner v. Evans*, 1 T. R. 267. *Winter v. Kretchman*, 2 T. R. 45. 2 Tidd. Pr. 966, (4th edit.)

the patent right is of a far greater value ; and, as it judicially appears upon the record, that each of the parties claims the invention as his own, each has a matter in controversy sufficient in value to sustain the jurisdiction. It is not necessary to decide, whether, if the plaintiff had been a mere stranger, claiming no title to the invention, he could have brought a writ of error from the judgment of the District Court. The difficulty in such a case would have been, how to estimate the value, which the plaintiff could have in the controversy. On this point no opinion is intended to be given.

The appellate jurisdiction in this Court being established, we may now pass to the consideration of the other questions arising in the cause.

It is deeply to be regretted, that the proceedings were from accidental causes conducted in so inartificial and irregular a \*168 manner by the parties in the Court below. \* The *scire facias* does not express in the pointed and distinct terms of the statute the causes, for which the patent is sought to be repealed. It ought to have contained a direct allegation or suggestion, that the patent was obtained surreptitiously, or upon false suggestion, and have called upon the defendant for that cause, and for that cause only, to show cause, why the patent should not be repealed. Whereas the *scire facias*, after reciting (and, in my judgment, very unnecessarily) the whole proceedings prior to the making of the rule absolute, proceeds to state at large, in a new allegation, a specification of the particulars, in which the plaintiff denied the machine in controversy to be the invention of the defendant, and claimed it to be the invention of another (meaning, as the context shows, of the plaintiff himself) ; and then calls upon the defendant to show cause, why the letters patent, for the cause aforesaid, should not be repealed. From the manner, therefore, in which this new allegation is inserted in the *scire facias*, it is uncertain, whether the defendant is to answer to that only, (and it



does not contain a syllable, as to the patent's having been obtained surreptitiously or upon false suggestion) or whether the statements in the original affidavit are now included in the charge.

This specification was very properly ordered by the Court ; but it was in the nature of a bill of particulars, to assist the defendant at the trial, and by no means a regular part of the *scire facias*. It is very probable, that this informality occasioned the embarrassment of the subsequent pleadings, in which it is not very easy to discern at once, what was the precise point, which the parties meant to put in issue ; whether, that the patent was obtained surreptitiously or upon false suggestion ; or that the improvement, for which the patent issued, was the invention of the defendant. And this again, probably, misled the Jury in shaping their verdict.

\* In my judgment, the plea must be considered, substantially, \*169 as putting in issue the only point, that, on the *scire facias*, could be material, viz. whether the patent was obtained surreptitiously or upon false suggestion ; and, of course, that the residue of the plea is mere surplusage. The material inquiry then is, whether the Jury have, in direct terms, or by necessary legal intendment, returned a verdict upon this issue.

Many authorities have been cited to show the power of Courts of law to amend verdicts, which are defective, so as to conform to the real intentions of the Jury. It is unnecessary to examine the nature or limits of this doctrine ; for no amendment was made in this verdict by the District Judge ; and a refusal to amend a verdict is not the subject of a writ of error. It is a mere exercise of discretion by the Court below ; and it does not even appear upon this record, that any application was made to the Court for that purpose.

The verdict is, therefore, to be taken as it stands upon the record, with all its imperfections on its head. It is clear, that,

in terms, it does not find the issue joined by the parties ; if, however, the Court can collect the point in issue out of the verdict, it will be sufficient.<sup>1</sup> The plaintiff contends, that the fact found by the Jury, that the machine was the joint invention of the plaintiff and the defendant, is decisive in his favor ; and, by inference, includes the point in issue ; and that the subsequent finding for the defendant is repugnant to this fact, and therefore ought to be rejected. On the other hand, the defendant contends, that the general finding is for the defendant ; and the special fact found is not repugnant to it, and may, therefore, be rejected as surplusage. \*170 If there be a material repugnancy \* in the verdict, it is not competent for the Court to reject either part of the finding ; for it is utterly impossible for the Court to decide, which is the truth of the case. And if it were otherwise, there is no authority to substitute its own opinion for that of the Jury. In such case, the repugnancy will be fatal. A verdict, which finds two inconsistent material facts, is void, and cannot be a foundation for a legal judgment.<sup>2</sup> On the other hand, a general verdict, (as this must be deemed to be,) which finds the point in issue by way of argument or inference, is void, even, as it is said, though the argument or inference be necessary.<sup>3</sup> It follows, therefore, that in no event can the verdict be adjudged in favor of the plaintiff. It is either a verdict, which finds the substance of the issue for the defendant, or it is void for repugnancy, uncertainty, or insufficiency.

There are many authorities, in the books respecting this subject, some of which are not easily reconcilable with sound sense, or with legal principles. From the mass of cases, however, some rules may be extracted, which commend themselves to the

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<sup>1</sup> Hob. 54. Com. Dig., *Pleader*, S, 18, S, 26. *Hawks v. Crofton*, 2 Burr. R. 698.

<sup>2</sup> Com. Dig., *Pleader*, S, 23.

<sup>3</sup> *Rowe v. Huntington*, Vaug. R. 66, 75. Com. Dig., *Pleader*, S, 23.

judgment of all of us. If, for instance, the Jury find the point in issue, and also another matter out of the issue, the latter finding is void, and may be rejected as surplusage.<sup>1</sup> But it is otherwise, if the matter so found be contained in the issue; for then, if it be material and contradictory, it cannot be rejected as surplusage. So if the point, on which the verdict is given, be so uncertain, that it cannot be clearly ascertained, whether the Jury meant to find the issue or not, it cannot be helped by intendment; and, *à fortiori*, if it be repugnant to other facts expressly found.<sup>2</sup>

\* Let us now apply these principles to the present verdict.\*171 From the terms, in which the verdict is expressed, it seems to be an argumentative finding for the defendant. The Jury find, that the plaintiff has not supported his allegations, and therefore find for the defendant. What were those allegations? That the patent was obtained surreptitiously and upon false suggestion, as stated in the original affidavit? Or, that the machine in controversy was the sole invention of the plaintiff, as stated in his amended allegation? The terms of the verdict more correctly apply to the latter, than to the former; and there is this additional reason for this construction, that the fact specially found is, in this view, consistent with the general finding. For, as the Jury find, that the plaintiff and defendant were both concerned in the invention, then the allegation of the plaintiff, that it was his sole invention, was not supported. In this view of the verdict, it is void, either because it is merely argumentative and uncertain, or, more properly, because it does not find the real point in issue between the parties.

On the other hand, if the verdict be supposed to refer to the real issue between the parties, it is to be considered if it be not necessarily repugnant. By the patent Act, no

<sup>1</sup> Com. Dig., *Pleader*, S, 18, S, 28.

<sup>2</sup> Id., *Pleader*, S, 2, S, 23.

person could entitle himself to a patent for any machine, unless he was the true inventor of it, and would make oath to that fact before some competent authority. By the expression in the statute, "true inventor," is undoubtedly meant the sole and exclusive inventor; for if the machine were the joint invention of several persons, neither of them could claim to be the true inventor, having an exclusive title to the patent; but the interest would be a joint or common interest in the whole. In such a case, therefore, if a party were to obtain a patent for the invention, having sworn, that he was the true inventor, he would, in the language of the Act, obtain it "upon \*172 false suggestion"; \* and as such false suggestion would be a surprise and fraud upon the government, it might well also be declared to be obtained "surreptitiously." In the present case, the defendant obtained his patent, claiming it to be his own exclusive invention, and asserting the fact upon his oath. The Jury have found, "that the plaintiff and defendant were both concerned in the invention." It is said by the defendant's counsel, that this is not a finding, that the plaintiff and defendant were jointly concerned in the invention. I confess, that this seems to me an over-refinement, and an exercise of legal astuteness too ingenious, and too subtle to be applied to the language of verdicts. When the Jury declare, that both were concerned in the invention, the natural meaning of the words is, that the invention was the result of their joint, and not of their several and independent labors. However complicated the machine may be, the invention itself is not susceptible of division. If the plaintiff and defendant separately and independently invented several parts of the machine, capable of a distinct use, then those parts might be considered as separate inventions, for which each inventor might, perhaps, be entitled to a separate patent. But the present patent claims the invention, as a whole; and the Jury find,

that in this invention they were both concerned ; which I cannot understand in any other sense, than as verifying the invention to be a joint, simultaneous production of the genius and labor of both parties. The special fact, so found, is necessarily repugnant to any general verdict in favor of the defendant, upon the real issue between the parties. It is a fact, consistently with which no such verdict could be given. It is also a direct contradiction of the allegation in the plea of the defendant, that the improvement was invented by him ; and if that allegation be considered as part of the issue, the finding is so far against the defendant. In either view, the verdict is repugnant, in a material point, and consequently void.

\* In any way, therefore, of considering the verdict, it cannot, \*173 in my judgment, be supported. And I will add, that where a verdict is not expressed substantially in the terms of the issue, the case ought to be extremely clear, that should induce a Court to make it the ground of a final judgment. For this defect in the verdict, the judgment of the District Court must be reversed, and a new trial had at the bar of this Court.

There are several points, however, made upon the bill of exceptions, which have been fully argued, and as they may be important in the future trial of this cause, I am willing to declare my present opinion respecting them. Before entering into the merits of them, I cannot forbear to remark upon the inaccuracy, with which the bill of exceptions has been framed. It contains, not a statement of the facts, but of the testimony introduced to prove the facts, on each side, *in hæc verba* ; and the counsel for the plaintiff then insisted, that the matters so produced and given in evidence, on the part of the plaintiff, were sufficient, and ought to be admitted and allowed as decisive evidence, that the defendant surreptitiously obtained his patent, and that he was not the

inventor of all the essential parts of the machine in controversy. There is no rule of law, which would have authorized the Court to give such direction to the Jury; for the matters so produced are not distinctly stated, but are mere questions of fact to be ascertained by the Jury.<sup>1</sup> The bill of exceptions should either have stated the facts, and not merely the evidence of the facts, and prayed the opinion of the Court thereon; or, if the evidence was doubtful, it might have stated, that evidence was given to prove certain facts, and then have prayed the opinion of the Court thereon, if the jury should so find the facts. In England, when the facts are doubtful, \*174 I believe \* it is more usual in practice to insert those facts in the bill of exceptions, as settled by the jury, and then to allege the opinion of the Court, as an absolute one, upon the trial.

Waiving, however, all objections to the terms and form of the bill of exceptions, let us now proceed to examine the points, stated at the argument. The first objection, taken to the opinion of the Court below, is, in substance, that the Court ought to have directed the Jury, that the refusal of the defendant to submit his claim to arbitration, under the circumstances detailed in the evidence, (which brought it within the 9th section of the patent Act) and subsequently obtaining a patent after the plaintiff had obtained his, was conclusive evidence, that the patent of the defendant was obtained surreptitiously or upon false suggestion; whereas the Court held, that these facts were not, *per se*, conclusive to establish this point. In my judgment, there was no error in this opinion of the Court. If an arbitration had been actually perfected between the parties under the 9th section, the award or decision of the arbitrators would have been final between the parties only

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<sup>1</sup> *Smith v. Carrington*, 4 Cranch R. 62.

so far, as respected the granting of the patent. It would not have concluded the parties from showing in the present suit, that it was obtained upon false suggestions. It would not have concluded them, in an action for an infringement of the patent, from asserting any defence allowed by the 6th section of the patent Act. The sole object of such an award is, to ascertain who is *primâ facie* entitled to the patent. But when once obtained, the patent is liable to be repealed or destroyed by precisely the same process, as if it had issued without objection. If the award itself would not have been conclusive, *à fortiori*, a refusal to join in an arbitration under the statute cannot be so.

Another objection is, that the Court held, that the burden of proof to maintain the issue lay upon the plaintiff; \*and that it was \*175 incumbent on him to prove, that the defendant was not the true inventor of the machine in controversy; whereas, it is contended, that the burden of proof lay on the defendant, and the plaintiff was not bound to prove a negative. In my judgment, there was no error in the opinion of the Court upon this point. By the very form of the pleadings the affirmative rested on the plaintiff. He was bound to prove, that the patent was obtained surreptitiously or upon false suggestion. This is an affirmative proposition; and to have called upon the defendant to prove the contrary, would have thrown upon him the burden of the proof of a negative proposition. In respect to the point, who was the inventor, the possession of the patent was *primâ facie* evidence for the defendant at least upon this process; and the proof, that another was the inventor, was not the proof of a negative proposition. And, at all events, the trial being in substance upon the general issue, the plaintiff could entitle himself to a verdict only by the strength of his own proof, and not by the weakness of that of his adversary.

*Wm. W. Barrett*

Upon the whole, these exceptions must be overruled; but for the defect of the verdict a *venire facias de novo* must be awarded.

*Judgment reversed.*

# CIRCUIT COURT OF THE UNITED STATES.

## Spring Circuit.

MASSACHUSETTS, MAY TERM, 1817, AT BOSTON.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN DAVIS, District Judge.

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### ALEXANDER MITCHELL v. P. P. F. DEGRAND.

When, upon a bill payable at so many days *after sight*, the holder [presents the bill for acceptance, and elects to consider what passes on such presentment, as a non-acceptance, (although in strictness he might have otherwise acted,) and protests the bill for non-acceptance, he is bound by such election as to all the other parties in the bill, and must give due notice to them of the dishonor accordingly, otherwise they will be discharged. And a subsequent acceptance by the drawee on the next day will not be sufficient to charge the drawer, in case no such notice is given, and the drawee fails before the day of payment.

A bill drawn payable at five days *after sight*, and accepted on the *first* day of a month, is payable on the *ninth* of the same month, the day of the acceptance being excluded, and the three days of grace allowed; a demand on the *eighth* and protest for non-payment on that day, is too early, and therefore void.

A bill, payable at five days after sight, is presented for acceptance on the 30th of September, but not in fact accepted until the 1st of October, the acceptance takes effect only from that day, and does not relate back to the time of presentment on the preceding day. A bill, payable at so many days after sight, means so many days after legal sight, that is, so many days after the acceptance, for that is the sight, to which the bill refers.

**T**HIS was an action on a bill of exchange drawn by P. P. F. Degrand, the defendant, in Boston, on George P. Stevenson, of Baltimore, in favor of Alexander Mitchell, the plaintiff, of the same place. The tenor of the bill was as follows.



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\*\$1000.

Boston, 26th Sept. 1816.

At five days sight please pay to the order of Alexander Mitchell, Esq. one thousand dollars in bills of the Bank of the City of Baltimore, which please to charge with or without further advice to

Your friend and obedient servant,

P. P. F. DEGRAND.

GEORGE P. STEVENSON, Esq.

BALTIMORE.

On the 30th of September, it was presented for acceptance at the counting-house of the drawee, by John C. Conner, the clerk of the plaintiff; the drawee was then absent on military duty, but his clerk requested it might be left, saying Mr. Stevenson would accept it, when he returned. The bill was left, and immediately protested by the plaintiff for non-acceptance. On the following day John C. Conner called again at the counting-room of the drawee, and met him coming out. Mr. Stevenson told him that he was much engaged at the moment, but would accept, and send the bill to Mr. Mitchell in the course of the day. No notice was given to the drawer of the protest for non-acceptance before the 8th of October, on which day the bill was protested for non-payment, the drawee having failed before that time. On the 12th of the same month a Mr. Stanton, who was the plaintiff's agent for this purpose, called upon the defendant for payment, which he refused on the ground of not having received due notice of the protest for non-acceptance. The bill and protest were afterwards remitted to Mr. Stanton in a letter dated the 12th of October.

*Shaw* and *Williams*, for the defendant, contended, 1st. that there was no acceptance of the bill by the drawee on the 30th of September. That there was no evidence, that Dugan, the clerk of Stevenson, had any authority to accept it; that his saying that it would be accepted, could only be considered as his opinion of

what Stevenson would do. That there was nothing therefore in \*178 the present case, which \*could amount to an acceptance, either by the clerk or Mr. Stevenson, and that the holder himself was of the same opinion fully appeared from his having caused the bill to be protested on the same day.<sup>1</sup>

2dly, That if the circumstances, which took place on the 30th of September, did not amount to an acceptance, but on the contrary were considered in the light of a non-acceptance, and a protest made accordingly by the plaintiff, then no subsequent arrangement between the holder and drawee could so alter the case, as to affect the rights of the drawee, and change the non-acceptance into an acceptance, or in any degree release the holder from the obligation of duly notifying the defendant of the previous non-acceptance.<sup>2</sup>

3dly, That even should the subsequent acceptance by the drawee be considered as annulling the previous non-acceptance, and rendering notice of it to the drawer unnecessary, still the defendant would not be liable, inasmuch as it appeared from the facts, that the drawee was called upon for payment a day before the bill became due; for if the acceptance was on the 1st of October, the only day, on which there could be any pretence of one, the bill would be due on the ninth, whereas it was presented for payment, and protested on the 8th of October.<sup>3</sup>

4thly, That there was not in fact any legal acceptance of the bill by the drawee at any time. He merely told the clerk of the holder that he would accept it, whereas the acceptance ought to have been in writing.

*Prescott and Gallison*, for the plaintiff, argued, that notice of

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<sup>1</sup> *Sayer v. Kitchen*, 1 Esp. R. 209. *Orr et al. v. Maginnis*, 7 East R. 359. *Sproat v. Matthews*, 1 D. and E. R. 182.

<sup>2</sup> *Bentinck v. Dorrein et al.*, 6 East R. 199.

<sup>3</sup> *Wiffen v. Roberts*, 1 Esp. R. 261.

the protest for non-acceptance was not in this \*case necessary, because before there was an opportunity of notifying the defendant, the bill was accepted by the drawee, and the previous non-acceptance rendered void. That the holder had a right to consider the circumstances attending the presentment of the bill on the 30th of September as a non-acceptance, or not, as he pleased, and that although he had the precaution to have the bill protested, he was not concluded by it from taking advantage of a subsequent acceptance if made within a reasonable time.<sup>1</sup>

2dly, That as to the presentment for payment being made too early, it was not the case, because the acceptance must be considered as referring back to the day of the first presentment of the bill, which was on the 30th of September.<sup>2</sup>

3dly, That the verbal acceptance of Mr. Stevenson, by saying *he would accept the bill*, was sufficient to satisfy the law, without any acceptance in writing.<sup>3</sup>

In the course of the cause the counsel for the defendant called upon Mr. Stanton for a letter, which he received from the plaintiff, in order to prove, that the plaintiff himself never thought, that there was any acceptance in this case ; and that he only now advanced it for the purpose of charging the drawer. Mr. Stanton stated, that the letter was destroyed by his clerk ; and the clerk upon being questioned said, that he received it from Mr. Stanton with some other letters, which he was directed to destroy, and, as he supposed, for the purpose of keeping them out of the way.

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<sup>1</sup> *Sproat v. Matthews*, 1 Term Rep. 182. *Bentinck v. Dorreïn*, 6 East R. 200.

<sup>2</sup> *Beawes*, § 252, 1st ed. p. 447.

<sup>3</sup> *Clark v. Cock*, 4 East R. 57. 5 Id. 510. *Wynne v. Raikes*, 5 East R. 515. *Lumley v. Palmer*, 2 Stra. R. 1000. *Pierson v. Dunlop*, Cowp. R. 571. *Bayley on Bills*, 44.

\* **STORY J.** This is an action on a bill of exchange, brought by the payee against the drawer. The bill was payable five days after sight; and was presented at the counting-room of the drawee for acceptance on the 30th of September. No acceptance was then made, the drawee being absent on military duty, and his clerk expressing only an opinion, that it would be accepted by the drawee. I do not say, that under these circumstances the holder was bound to treat what passed between him and the clerk, as a non-acceptance of the bill. On the contrary he might properly have waited until the next day, as a reasonable time to ascertain the intentions of the drawee, and such delay could not have been deemed laches on his part. But he elected to consider the bill as dishonored on the 30th of September, and protested it accordingly for non-acceptance. And the question now is, whether, as to all the other parties to the bill, he is not bound by that act; and I am very clear that he is. When a bill is once dishonored, the holder is bound to give notice, by the next practicable mail, to the parties, whom he means to charge for the default.<sup>1</sup> By the legal construction of the contract they have a right to such notice, and the omission to give it, with due and seasonable diligence, discharges them from every legal liability upon the bill. No such notice was given in this case, and therefore the drawer was absolved from all liability.

But it is said that on the 1st of October, and before the mail for Boston was closed on that day, the drawee accepted the bill, and thereby notice became unnecessary. Assuming that the evidence in this case clearly shows an acceptance, still in my judgment it does not change the previous legal predicament of the parties. When once a bill is dishonored, the right of the  
\*181 other parties to notice \* immediately and absolutely attaches, and no subsequent acts between the holder and drawee can vary

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<sup>1</sup> *Lenox v. Roberts*, 2 Wheaton Rep. 377.

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that right. Whatever is afterwards done by the holder is at his own peril, and cannot change the responsibility of others. A holder cannot elect to treat a bill as dishonored, and afterwards as duly honored. The consequences of such a doctrine would be the most mischievous to the commercial world; and I have no difficulty in holding it not to be law.

But supposing this point were doubtful, there is another, which is decisive against the plaintiff. The acceptance, if any, was certainly not made before the 1st day of October; and upon that supposition the bill being payable five days after sight, was payable on the *ninth*, and not on the *eighth* day of October; payment was therefore demanded a day before the bill became due. To avoid this conclusion, it is argued, that the acceptance may be considered as relating back to the 30th of September, when the bill was first presented. But neither of these grounds can be maintained. The doctrine of relation cannot apply to cases of this nature. The acceptance or non-acceptance of a bill is a single act, taking effect from the time when done, and having no retroactive operation. How can it be possible to say, that this bill was accepted on the 30th of September, when the party has expressly protested it for non-acceptance on that day?

There is as little foundation for the other suggestion. A bill, payable in so many days after sight, means after so many days legal sight. Now, it is not merely the fact of having seen the bill, or known of its existence, that constitutes a presentment to the drawee in legal contemplation. It must be presented to him for acceptance, and the time of the bill begins to run, not from the mere presentment, but from the presentment and acceptance. If the acceptance be general, it is in legal construction an agreement to pay in so many days after the acceptance, for that is the \*sight, which the drawee admits and refers to. A different \*182

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doctrine is supposed by Mr. Justice *Bayley*<sup>1</sup> to be asserted by *Beawes*;<sup>2</sup> and if it be so, (which is not admitted,) I should not incline to uphold his authority against that of *Marius*<sup>3</sup> who holds the doctrine I have asserted, and which I think stands sustained upon principle, as well as authority.†

*Plaintiff non-suited.*

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<sup>1</sup> Bayley on Bills, 67, but see *Ib.* 53.

<sup>2</sup> Beawes on Bills of Exchange, § 252, Vol. 1, 455, edit. 8vo. 1795.

<sup>3</sup> Marius on Bills, 19.

† Upon examination it will be found that Beawes does not assert the position contended for. His language is, "if bills are made payable at some days after sight, *their acceptance is dated on the day they are presented, and from thence the days of their running are counted.*" Beawes on Bills of Exchange, § 252, p. 455, edit. 1795. This language is not free from all ambiguity; but its true meaning seems to be, that *the acceptance* is the time, from which the running of the days of a bill, payable at so many days *after sight*, is to be computed, which is in effect the same as the doctrine of Marius. The doctrine of Marius is recognised in Chitty on Bills, p. 195, 277. *Com. Dig., Merchant, F, 7. Campbell v. French*, 6 T. R. 200, 212. Pothier de Change, Part 1. ch. 1, § 2, art. 13. Code de Commerce, Lib. 1. tit. 8, art. 131. See also Bayley on Bills, 53.

## FRANCIS C. LOWELL v. WINSLOW LEWIS.

The law entitles a party to a patent for a new and useful invention ; and by " useful " is meant, not an invention in all cases superior to the modes now in use for the same purpose, but " useful " in contradistinction to frivolous and mischievous inventions.

The patentee must describe in his patent, in what his invention consists, with reasonable certainty, otherwise it is void for ambiguity. If it be for an improvement in an existing machine, he must, in his patent, distinguish the new from the old, and confine his patent to such parts only as are new ; for if both are mixed up together, and a patent is taken for the whole, it is void.

But if the invention be definitely described in the patent, so as to distinguish it from what is before known, the patent is good, although the specification does not describe the invention in such full, exact, and clear terms, that a person skilled in the art or science, of which it is a branch, could construct or make the thing \*invented ; unless such defective description or concealment were with intent to \*183 deceive the public.

As among inventors, he who is first in time, has a prior exclusive right to the patent for the invention.

**T**HIS was an action on the case for the infringement of a patent-right. In the year 1813, Mr. Jacob Perkins obtained a patent for a new and useful invention in the construction of pumps, and afterwards assigned his interest therein to the plaintiff. The defendant became the assignee of a similar patent, taken out in 1817, by a Mr. James Baker ; and it was for the constructing and vending pumps under this second patent, that the action was brought. The principal object of both the inventions, was, by dispensing with the box used in the common pumps, to obtain a larger water-way. To effect this, Perkins so constructed the valves of his pump, that they completely filled the area of the shaft, and fell upon its sides in the same manner, as by the old construction they did upon the box ; thus leaving the whole of the area, excepting that occupied by the valves themselves, for a water-way. The valves were of a triangular shape, and adapted only to a pump of a square form. This pump seemed to be principally useful, when it was desirable to throw up large quanti-

ties of water in a short space of time, and a number of hands could be put to the working of it.

The valves of Baker's pump were fitted to a round shaft, and occupied, like the other, the whole of its area ; but instead of resting upon the sides of the shaft, were supported by a brass rim, which prevented the friction against the sides of the shaft consequent upon the other construction, and to obviate which, Perkins, since obtaining his patent, had adopted a check-bolt. It appeared, that Baker's invention required fewer hands to work it, and could be applied to the common house-pump.

- \*184 \* *Webster* and *G. Sullivan*, for the defendant, contended, that the invention of Perkins was neither new nor useful, and, therefore, not entitled to a patent. That the specification was so loose and insufficient, as not to answer the requisites of the law in this particular, and the patent, therefore, void on that account ; and further, that the invention of the defendant was substantially different from that of the plaintiff.

*Gorham*, for the plaintiff, endeavoured to show, that the improvement invented by Perkins was entirely new, and highly useful ; and the specification sufficient to answer the requisites of the law, which only required, that it should be so particular, as that persons, acquainted with the construction of the same kind of machines, might be able to follow the description of it. And that, although differing in shape and some other unimportant particulars, it was, in principle, the same as that made and recorded by the defendant, under the patent of Baker.

A great number of witnesses were produced on both sides to sustain these positions.

STORY J., in summing up the cause to the Jury, stated as follows : — The present action is brought by the plaintiff for a supposed infringement of a patent-right, granted, in 1813, to Mr.



Jacob Perkins (from whom the plaintiff claims by assignment) for a new and useful improvement in the construction of pumps. The defendant asserts, in the first place, that the invention is neither new nor useful; and, in the next place, that the pumps used by him are not of the same construction as those of Mr. Perkins, but are of a new invention of a Mr. Baker, under whom the defendant claims by assignment. If the plaintiff is entitled to recover, the patent act gives him treble the actual damages sustained by him; and the rule for damages \* is, in this case, to allow <sup>\*185</sup> the plaintiff treble the amount of the profits actually received by the defendant, in consequence of his using the plaintiff's invention. The Jury are to find the single damages, and it is the proper duty of the Court to treble them in awarding judgment. And let the damages be estimated as high, as they can be, consistently with the rule of law on this subject, if the plaintiff's patent has been violated; that wrong doers may not reap the fruits of the labor and genius of other men.

To entitle the plaintiff to a verdict, he must establish, that his machine is a new and useful invention; and of these facts his patent is to be considered merely *primâ facie* evidence of a very slight nature. He must, in the first place, establish it to be a useful invention; for the law will not allow the plaintiff to recover, if the invention be of a mischievous or injurious tendency. The defendant, however, has asserted a much more broad and sweeping doctrine; and one, which I feel myself called upon to negative in the most explicit manner. He contends, that it is necessary for the plaintiff to prove, that his invention is of general utility; so that in fact, for the ordinary purposes of life, it must supersede the pumps in common use. In short, that it must be, for the public, a better pump than the common pump; and that unless the plaintiff can establish this position, the law will not give him the benefit of a patent, even though in some peculiar cases his invention might be applied with advantage. I do

not so understand the law. The Patent Act<sup>1</sup> uses the phrase "*useful invention*" merely incidentally ; it occurs only in the first section, and there it seems merely descriptive of the subject matter of the application, or of the conviction of the applicant. The language is, "when any person or persons shall allege, that \*186 he or they have invented any new and useful art, \* machine," &c., he or they may, on pursuing the directions of the Act, obtain a patent. Neither the oath required by the second section, nor the special matter of defence allowed to be given in evidence by the sixth section of the act, contains any such qualification or reference to general utility, to establish the validity of the patent. Nor is it alluded to in the tenth section as a cause, for which the patent may be vacated. To be sure, all the matters of defence or of objection to the patent are not enumerated in these sections.<sup>2</sup> But if such an one as that now contended for, had been intended, it is scarcely possible to account for its omission. In my judgment the argument is utterly without foundation. All that the law requires is, that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society. The word "*useful*," therefore, is incorporated into the act in contradistinction to mischievous or immoral. For instance, a new invention to poison people, or to promote debauchery, or to facilitate private assassination, is not a patentable invention. But if the invention steers wide of these objections, whether it be more or less useful is a circumstance very material to the interest of the patentee, but of no importance to the public. If it be not extensively useful, it will silently sink into contempt and disregard. There is no pretence, that Mr. Perkins's pump is a mischievous invention ; and if it has been used injuriously to the patentee by the defendant, it certainly does not lie in his mouth to contest its general utility. Indeed the defendant asserts, that

<sup>1</sup> Act of 21st of February, 1793, ch. 11.

<sup>2</sup> *Whitemore v. Cutter*, 1 Gallis. R. 429, 435.

Baker's pump is useful in a very eminent degree, and, if it be substantially the same as Perkins's, there is an end of the objection; if it be not substantially the same, then the plaintiff must fail in his action. So that, in either view, the abstract question seems hardly of any importance in this cause.

\*The next question is, whether Mr. Perkins's pump be a *new*\*187 invention. In the present improved state of mechanics, this is often a point of intrinsic difficulty. It has been often decided, that a patent cannot be legally obtained for a mere philosophical or abstract theory; it can only be for such a theory reduced to practice in a particular structure or combination of parts. In short, the patent must be for a specific machine, substantially new in its structure and mode of operation, and not merely changed in form, or in the proportion of its parts. Mr. Perkins's pump is square, and it is agreed, that a piston exactly fitted, and used as in his pump, cannot be found described in any scientific treatise, and has never been seen in operation. The butterfly valve, which approaches very near to it, has certainly been in use, and a triangular shape was well known in the perimeter valves. But the exact structure and position of a valve in a square pump, uniting the triangular and butterfly forms, is not known to have been used at any time previous to his invention, in the precise manner, in which Mr. Perkins uses them. In short, the combination of structure, which he uses, is alleged by the plaintiff's witnesses to be new; and if the Jury are satisfied, that it is substantially different from any thing before known in its mode of operation, then the plaintiff has surmounted this objection to his title to a recovery.

An objection of a more general cast (and which might more properly have been considered at the outset of the cause, as it is levelled against the sufficiency of the patent itself) is, that the specification is expressed in such obscure and inaccurate terms, that it does not either definitely state, in what the invention con-

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Lowell v. Lewis.

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sists, or describe the mode of constructing the machine so, as to enable skillful persons to make one. I accede at once to the doctrine of the authority, which has been cited,<sup>1</sup> that the patentee \*188 is bound to \*describe, in full and exact terms, in what his invention consists; and, if it be an improvement only upon an existing machine, he should distinguish, what is new and what is old in his specification, so that it may clearly appear, for what the patent is granted. The reason of this principle of law will be manifest upon the slightest examination. A patent is grantable only for a new and useful invention; and, unless it be distinctly stated, in what that invention specifically consists, it is impossible to say, whether it ought to be patented or not; and it is equally difficult to know, whether the public infringe upon or violate the exclusive right secured by the patent. The patentee is clearly not entitled to include in his patent the exclusive use of any machinery already known; and if he does, his patent will be broader than his invention, and consequently void. If, therefore, the description in the patent mixes up the old and the new, and does not distinctly ascertain for which, in particular, the patent is claimed, it must be void; since if it covers the whole, it covers too much, and if not intended to cover the whole, it is impossible for the Court to say, what, in particular, is covered as a new invention. The language of the Patent Act itself is decisive on this point. It requires (§ 3) that the inventor shall deliver a written description of his invention "in such full, clear, and exact terms, as to distinguish the same from all other things before known; and in the case of any machine, he shall fully explain the principle, and the several modes, in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions."

It is, however, sufficient, if what is claimed as new appear

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<sup>1</sup> *M'Furlane v. Price*, 1 Starkie's R. 192.

with reasonable certainty on the face of the patent, either expressly or by necessary implication. But it ought to appear with reasonable certainty; for it is not to be left to minute inferences and conjectures, from what was previously \* known or \*189 unknown; since the question is not, what was before known, but what the patentee claims *as new*; and he may, in fact, claim as new and patentable, what has been long used by the public. Whether the invention itself be thus specifically described with reasonable certainty, is a question of law upon the construction of the terms of the patent, of which the specification is a part; and on examining this patent, I at present incline to the opinion, that it is sufficiently described, in what the patented invention consists.

A question nearly allied to the foregoing, is, whether (supposing the invention itself be truly and definitely described in the patent) the specification is in such full, clear, and exact terms, as not only to distinguish the same from all things before known; but “to enable any person skilled in the art or science, of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same.” This is another requisite of the statute (§ 3), and it is founded upon the best reasons. The law confers an exclusive patent-right on the inventor of any thing new and useful, as an encouragement and reward for his ingenuity, and for the expense and labor attending the invention. But this monopoly is granted for a limited term only, at the expiration of which the invention becomes the property of the public. Unless, therefore, such a specification was made, as would at all events enable other persons of competent skill to construct similar machines, the advantage to the public, which the Act contemplates, would be entirely lost, and its principal object would be defeated. It is not necessary, however, that the specification should contain an explanation, level with the capacities of every person

(which would, perhaps, be impossible) ; but, in the language of the Act, it should be expressed in such full, clear, and exact terms, that a person skilled in the art or science, of which it is a branch, would be enabled to construct the patented invention. By the common  
\*190 law, if \* any thing material to the construction of the thing invented be omitted or concealed in the specification, or more be inserted or added, than is necessary to produce the required effect, the patent is void. This doctrine of the common law our Patent Act has (whether wisely, admits of very serious doubts) materially altered ; for it does not avoid the patent in such case, unless the “concealment or addition shall fully appear to have been made for the purpose of deceiving the public.” (§ 6.) Yet certainly the public may be as seriously injured by a materially defective specification resulting from mere accident, as if it resulted from a fraudulent design. Our law, however, is as I have stated ; and the question here is, and it is a question of fact, whether the specification be so clear and full, that a pump-maker of ordinary skill could, from the terms of the specification, be able to construct one upon the plan of Mr. Perkins. The principal objection to the specification in this case is, that it does not describe the check-bolt, or the form, or use, or size of the leather, or the mode of forming its edge and fixing it upon the valve, or the exact position and elevation of the valve. [Here the Judge read the specification, and commented on the evidence applicable to these objections ; and left it to the Jury to say, upon the facts, whether the specification was materially defective, and, if so, whether it was by design to deceive the public.]

Another (and under the circumstances of this case, probably the most material) inquiry is, whether the defendant has violated the patent-right of the plaintiff ; and that depends upon the fact, whether the pumps of Mr. Perkins and of Mr. Baker are substantially the same invention. I say substantially the same invention, because a mere change of the form or proportions of

any machine cannot, *per se*, be deemed a new invention. If they are the same invention, then Mr. Perkins, being clearly the first inventor, is entitled exclusively to the patent right, although Mr. Baker may \* have been also an original inventor; for the law \*191 gives the right, as among inventors, to him, who is first in time.

The manner, in which Mr. Perkins's invention is, in his specification, proposed to be used, is in a square pump, with triangular valves, connected in the centre, and resting without any box on the sides of the pump, at such an angle as exactly to fit the four sides. The pump of Mr. Baker, on the other hand, is fitted only for a circular tube, with butterfly valves of an oval shape, connected in the centre, and resting, not on the sides of the pump, but on a metal rim, at a given angle, so that the rim may not be exactly in contact with the sides, but the valve may be. If from the whole evidence the Jury is satisfied, that these differences are mere changes of form, without any material alteration in real structure, then the plaintiff is entitled to recover; if they are substantially different combinations of mechanical parts to effect the same purposes, then the defendant is entitled to a verdict. This is a question of fact, which I leave entirely to the sound judgment of the Jury.

*Verdict for the defendant.*

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#### MARY GILMAN v. SAMUEL BROWN AND OTHERS, IN EQUITY.

The scrip or certificate holders, in the New England Mississippi Land Company, hold their shares under the company itself, as a part of the common capital stock, and are not considered as holding derivatively, and solely as individual sub-purchasers, under the separate original titles of the original purchasers from the Georgia Mississippi Company, so as to be affected by any circumstances of defect in these separate original titles; those titles being in fact now vested in the trustees of the New England Mississippi Company itself, as part of its common stock, and not in the individual holders.

The award of Commissioners under the Acts of Congress of the 31st of March, 1814, ch. 98, and of the 23d of January, 1815, ch. 706, and of the 3d of March,

1815, ch. 778, appointed to settle the claims of the New England Mississippi Land Company and others to the Yazoo Lands, (so called) is not conclusive as between the scrip-holders and the said company, as to their rights, derived under the grants of certificates of shares in the stock of the company itself. The commissioners had no jurisdiction of any such question.

\*192 \* The origin and nature of liens on land for unpaid purchase-money.

Generally speaking such a lien exists, as between vendor and vendee, and also as against subsequent purchasers from the vendee with notice, that the money remains unpaid; but not as against a purchaser *bonâ fide* without notice. But the rule itself is not inflexible, as between vendor and vendee. And therefore if the parties do any unequivocal act, by which they clearly show that they do not contemplate such a lien to exist, the lien is not permitted to attach. If the vendor take a distinct security for the money, either of property, or of the responsibility of a third person, the lien is waived. But merely taking the note or bond of the vendee himself, without a surety, is no waiver of the lien. If the vendor take a negotiable note of the vendee, *endorsed by a third person*, payable at future times by instalments, this is such a distinct security as extinguishes the lien.

And *quare*, whether on a purchase of lands, lying in another State, *made under a contract executed in Massachusetts* by citizens of that State, a lien for the purchase-money vests in favor of the vendors, who are citizens of the State where the lands lie, the contract being silent on that head, and no such lien existing by law in any case of the purchase of lands in Massachusetts. A lien is always supposed to exist by the tacit consent of all the parties. Can such consent be presumed where the law of the State is not known to the purchasers in another State?

A lien is neither a *jus ad rem*, nor a *jus in re*; and the lien of a vendor on the land sold is so mere a creature of the Court of Equity, that its existence cannot be safely predicated in any case, until established by the decree of the Court. *Quære*, whether Commissioners under the Acts of Congress aforesaid, had any jurisdiction to inquire into or settle any claim for a mere lien.

**T**HIS cause was by consent heard upon the bill, answer, and exhibits in the case. There were no facts in dispute between the parties; and the whole controversy turned upon questions of law.

The material facts were these: In the month of January, 1796, sundry persons, and among them William Wetmore, purchased of the agents of certain persons in Georgia, called the Georgia Mississippi Company, then in Boston, a tract of land, then in the State of Georgia, and now in the Mississippi Territory, estimated to contain 11,380,000 acres, at ten cents per acre; which tract the Georgia Mississippi Company had purchased of the State of Georgia, and had received a grant thereof in due form of law. The conditions of the purchase were, that the purchase-money



should be paid as follows, viz. two cents thereof on or before the first day of May, 1796; one cent more on or before the first \* day of October, 1796; two and a half cents more on or be- \*193 fore the first day of May, 1797; two and a half cents more, on or before the first day of May, 1798; and the remaining two cents on or before the first day of May, 1799. The whole of the purchase-money was to be secured by negotiable notes of the several purchasers with approved endorsers, to be made payable to Thomas Cumming, President of the Georgia Mississippi Company or order, payable at the Bank of the United States at Philadelphia, or at the Branch Bank of Boston, and to be delivered to the agents upon the execution of the deed of conveyance by them. It was further agreed, that the deed, when executed, should be placed in the hands of George R. Minot, Esq., as an escrow, to be delivered over by him to the grantees upon the first payment of two cents payable in May, 1796, for which first payment, and for that only, the purchasers agreed to hold themselves jointly responsible. Accordingly, a deed of conveyance was executed by the agents dated the 13th day of February, 1796, to certain grantees named by the purchasers, to wit, William Wetmore, Leonard Jarvis, and Henry Newman, in trust for the purchasers; and the same was duly placed in the hands of Mr. Minot, as an escrow, and negotiable notes with approved endorsers were duly delivered to the agents by all the purchasers for their respective shares of the purchase-money. And afterwards, the first payment of two cents having been satisfactorily made to the agents, the said deed was, with their consent, delivered over to the grantees as an absolute deed; and a deed of confirmation thereof was afterwards, in February, 1797, duly executed and delivered to the grantees by the Georgia Mississippi Company. After the purchase, and before the delivery of the deed, the purchasers formed themselves into an association by the name of the New England Mississippi Land Company, and executed

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Gilman v. Brown *et al.*

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sundry articles of agreement, \* and, among other things, therein agreed, that the deed of the purchase should be made to Jarvis, Newman, and Wetmore, as grantees as above stated (art. 2d); that they should execute deeds to the several original purchasers for their proportions in the lands, but should retain these deeds, until the purchasers should sign and execute the articles of association; and should also execute a deed of trust, to certain trustees, as provided for in the articles, of such their respective shares in the purchase (art. 3d); that the several purchasers should execute a deed of trust to Jarvis, Newman, and William Hull, of their respective shares in the purchase, to hold to them and the survivor of them in trust, to be disposed of according to the articles (art. 4); that the business of the association should be managed by a board of directors, who were to have full power and authority to sell and dispose of the whole or any part of the property of the company, and to pay over to their respective proprietors their proportions of the money received from any and every sale, &c., (art. 8, 16, 20); that upon receiving a deed from any purchaser according to the tenor of the articles, the trustees were to give to each proprietor a certificate, in a prescribed form, stating his interest in the trust, and that he should hold it according to the articles of the association; which certificate was to be recorded in the company's books, and was to be "complete evidence to such person of his right in said purchase," and was to be transferable by endorsement; and, upon a record of the transfer in the company's books, the transferee was to be entitled to vote as a member of the company.

The share of Mr. Wetmore in the purchase was 900,000 acres. He paid the two cents per acre in cash; and of the notes given by him for the purchase-money, \$40,000 were paid by Mrs. Sarah Waldo, his endorser, and the residue \$45,000 still remains unpaid. Mr. Wetmore received his certificates from the \*195 trustees \* for his whole purchase, and having sold or conveyed

500,000 acres, he afterwards conveyed the remaining 400,000 acres to Robert Williams, to whom certificates for that amount were duly issued by the trustees, three of which certificates each for 20,000 acres, duly endorsed by said Williams, came into the plaintiff's hands for a valuable consideration; and, the assignment thereof having been duly recorded in the company's books, she was admitted, and has always acted as a member of the company.

From causes which are perfectly well known to the public, the New England Mississippi Land Company never obtained possession of the tract of land so conveyed to them.†

On the 31st of March, 1814, Congress passed an Act entitled, "An Act providing for the indemnification of certain claimants of public lands in the Mississippi Territory." By this Act and other subsequent Acts amending the same,<sup>1</sup> it was provided, that the claimants of the lands might file in the office of the Secretary of State, a release of all their claims to the United States, and an assignment and transfer to the United States of their claim to any money deposited, or paid into the treasury of Georgia, such release and assignment to take effect on the indemnification of the claimants according to the provisions of the Act. Commissioners were to be, and were accordingly, appointed under the Act, who were authorized to adjudge and determine upon the sufficiency of such releases and assignments, and also to "adjudge and determine, upon all controversies arising from such claims so released as aforesaid, which may be found to conflict with, and to be adverse to, each \* other." And the sum of \$196 \$ 1,550,000, to be issued in public stock, was appropriated by

† See the history of this case in *Fletcher v. Peck*, 6 Cranch R. 89, and in the public documents of Congress, 1809.

<sup>1</sup> Act of 23d of January, 1815, ch. 706. Act of 3d of March, 1815, ch. 778.

the Act, to indemnify the claimants, claiming in the name of, or under, the Georgia Mississippi Company.

The New England Mississippi Land Company duly executed the release and assignment, required by the Act of Congress; and presented the claims of the whole company before the commissioners. The commissioners awarded the company the sum of \$ 1,083,812 in stock, certificates for which were duly issued under the Act of Congress, and received by the treasurer of the company.

A farther claim was made for the whole amount of the original share of Mr. Wetmore, but the board of commissioners decided, that the Georgia Mississippi Company had a lien in equity on the land sold and conveyed to said Wetmore, for the purchase-money due and unpaid by said Wetmore, and that the indemnity under the Act of Congress should follow that lien, and be awarded to said Georgia Mississippi Company to the amount thereof. And inasmuch as the said Sarah Waldo was the holder of certain certificates issued by said trustees, on account of said Wetmore's original purchase, the commissioners further awarded, that the sum of \$ 40,000 of the purchase-money (which had been paid or satisfied by her for said Wetmore, on her endorsement) should be applied first to make good the scrip or certificates so issued to her; and that if there was any surplus after making her scrip or certificates good, such surplus could not be applied to the scrip or certificates held under Robert Williams, who did not become the assignee of the said Wetmore until after the said sum was paid. And the commissioners further decided, that the certificates, issued by the trustees on account of any of the original purchasers, who failed to make payment of the purchase-money to the Georgia Mississippi \*197 Company, were bad, and that the parties claiming \* under them must lose their indemnity under the Act of Congress. By this award of the commissioners, the claim of the New England

Mississippi Land Company for the amount of the share of the plaintiff was completely excluded. But the plaintiff claimed her share of the stock actually received, as a proprietor in the New England Mississippi Land Company, notwithstanding the award of the commissioners, and to establish this claim, the present suit was brought; and in her bill she averred, that she was a *bond fide* purchaser for a valuable consideration, without notice of the non-payment of the purchase-money by Mr. Wetmore, which averment was not denied by the answer.

*Webster* for the defendants. The plaintiff comes into Court as the holder of an equitable interest only. The legal estate was vested by the conveyances in trustees, and William Wetmore, from whom the plaintiff's title is derived, was entitled to nothing but the benefit of the trust. The title, therefore, is no better in the plaintiff's hands, than it was in the hands of William Wetmore. The purchaser of an equity must abide by the case of the person from whom he buys. He must take the estate subject to all incumbrances. Want of notice, or payment of a valuable consideration, will not enable him to raise himself higher than his vendor. Lord *Thurlow* says,<sup>1</sup> he takes that to be a universal rule.<sup>2</sup>

Holding the title of Wetmore subject to all the equity which belonged to it in his hands, the question is, whether the plaintiff can claim any portion of this fund? A sufficient answer to this claim is, that she has contributed nothing to the fund. She wishes to partake in the benefit, \*without having partaken in the \*198 burden. She may indeed have paid a valuable consideration to Wetmore, or his assignee of whom she purchased; but that pay-

<sup>1</sup> *Davis v. Austin*, 1 Ves. jun. R. 247.

<sup>2</sup> See also *Macreth v. Symmons*, 15 Ves. jun. R. 329, and Sugden, 482, (2d Lond. edit.)

ment has not gone into this fund, and gives her no equity against these defendants. She is the representative of Wetmore's right, and as far as any thing was paid on that right, so far an allowance has already been made by the commissioners under the Act of Congress, to those whom they thought entitled to receive it. For what remains, she can be entitled to nothing, because, as to this, the right which she represents has paid nothing.

It has been urged, that the New England purchasers intended to incorporate their several titles and estates into one common estate, and out of this to carve new portions for the several purchasers, according to the *amount* of their original interest, but entirely disregarding the *quality* of their original titles. If this had been so, it would not help the plaintiff's case. Wetmore, as well as the others, had covenanted for title, and could not be permitted, in a Court of Equity, to claim against those covenants the benefit of a conveyance, which turns out to be inoperative and unproductive, as far as he was concerned in it, on account of his violation of the covenants of his deed. But there was no intention to consolidate their several titles by the purchasers. They had purchased in unequal portions a large tract of land. It had been conveyed to them by several and distinct conveyances. They did not expect to make partition, and occupy the land immediately. Their object was to sell, and this object could be best attained, as they supposed, by acting together. They agreed, therefore, on common trustees to hold the legal estate, and on a committee, who should be the common agents, stewards, or attorneys of the parties. But in their deeds to \*199 the trustees they covenant severally, \* each one for himself, and expressly renounce all mutual responsibility.

They agreed to appoint the same trustees, and the same agents, but there is nothing from which it can be in the slightest degree inferred, that they intended to take the risks of each other's titles.

It was not necessary to say, whether the commissioners were well supported in the decision which they had made. No fraud or negligence is at any rate imputed to the defendants. They have used due diligence, and sought to increase the fund, by obtaining from the commissioners the stock which would have belonged to the original purchase of Wetmore, if his title had been deemed valid. In this they have failed without any fault of their own. The commissioners have decreed, that that portion of Wetmore's purchase which was conveyed to Williams, through whom the plaintiff derives her title, is not entitled to any indemnification. They proceed on the ground, that the original Georgia vendors had a lien for the purchase-money, and that they, if any body, the purchase-money not being paid, are entitled to the indemnity provided by the Act of Congress. That the vendor has in equity a lien for the purchase-money against the vendee, and all purchasers under him with notice, if it be a legal estate; and against all persons purchasing with or without notice, if it be an equitable estate; could not be denied as a general doctrine. The English cases, on this point, are all considered by Lord *Eldon* in *Macreth v. Symmons*.

There may be a relinquishment of this lien; and the evidence of such relinquishment may result from the nature of the transaction and the circumstances attending it. How far such evidence existed here, it was the duty of the commissioners to consider. If they have erred in judgment, the consequences of that error ought not to be thrown on the defendants. The stock, which the commissioners \*were to issue, may be con- \*200 sidered as the proceeds or product of the estate vested in the trustees. The bill does not complain, that the defendants have injured the plaintiff by surrendering the estate to the United States. In this they are admitted to have done precisely what they ought to have done. The complaint is, that a just distribution has not been made of the proceeds. But the plaintiff's

estate has produced no proceeds. The commissioners were empowered by the Act to judge between adverse claims. They have decided against the claim of the plaintiff; and it would be manifestly unjust and unreasonable, that, having a bad claim herself, she should partake with others in the benefit of their claims, which are good, unless she clearly proves an agreement to form this sort of partnership. And indeed if it were proved, that Wetmore and others agreed to form this partnership, each at the same time covenanting for the title of what he himself brought to the common stock, he could not claim in equity a proportionate share of the proceeds of the whole, having broken his own covenant, and the general proceeds being thereby diminished in an amount equal to what he undertook to convey to the trustees. If the plaintiff could recover in this case against the defendants, one of whom is the surviving trustee, that trustee must have his action against Wetmore on the covenants of his deed of trust. But such a proceeding would be novel. It is not the course in equity to treat covenants as distinct and independent, but to require of plaintiffs to allege and prove performance, or readiness to perform on their part.<sup>1</sup> If the land, or its proceeds, have been taken from the trustee by some one, whose title has been adjudged better than that of the *cestui que trust*, is it possible, that the *cestui que trust* can have any claim on the trustee?

- \*201 \* The plaintiff relies on the articles of association, which say that the certificate shall be complete evidence of the title. So it may be; but it does not say what title the holder of the certificate shall be taken to have. The articles mean no more than that the certificate should be evidence of the transfer. Whatever the vendor could sell, he might assign by endorsing the certificate. But in this there is no agreement to assure the title.

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<sup>1</sup> 2 Fonblanque, 383.



The certificate itself refers to the articles of association and the deeds of trust, to show the nature and condition of the property. These articles and deeds prove clearly, that the original purchasers stand on their several distinct purchases, and decline all mutual responsibility. She must therefore be taken to have known, what she purchased, as the reference in the certificate to the deeds and articles was sufficient to put her on inquiry.

Where one has sufficient information to lead him to the knowledge of the fact, he shall be deemed conusant of it.<sup>1</sup> Even if her estate had been a legal and not an equitable interest, still this constructive notice would have prevented her from standing in any better condition, than those under whom she held.

It may be added, that this whole subject was within the jurisdiction of the commissioners. They were not bound to award an aggregate sum to the defendants, to be by them divided for the benefit of the associates. In point of fact they did award in some instances to individuals, who made application for themselves, not through the agency of the defendants. In regard to the sums, which the defendants have received, the commissioners have decreed, that the plaintiff is entitled to no portion. Whatever their original rights were, all parties have agreed to surrender them to the United States, and to receive indemnification \* to the amount, and in the manner, provided by the Act of Con-<sup>\*202</sup>gress. Under that Act nothing has been allowed the plaintiff. The defendants, as her agents, have received nothing, and therefore can be chargeable with nothing.

*Amory*, for the plaintiff. The fee simple in the lands in question, which vested in Wetmore, was transferred to Hull and others, trustees, and ever after remained in them. Mrs. Gilman, the plaintiff, was not the assignee of Wetmore, and did not hold

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<sup>1</sup> Sugden, 496, and cases there cited.

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his title ; she could not be an assignee without a privity, either in fact or in law, which did not exist in this case. The intention of the associates was, from the commencement, to avoid the difficulties of title, and to render the certificates of the trustees the only evidence thereof ; for which purpose the legal title was placed in the trustees, and a new title, in all the property, was derived from them. The certificate possessed by Mrs. Gilman does not contain the name of Wetmore, nor was the certificate originally issued in his name ; it could not have expressed a trust upon the portion, or title, acquired by him and conveyed to the trustees ; but such a certificate must have expressed a general interest or title, pervading the whole land. Inasmuch as the trustees derived their title, not from Wetmore only, but from different sources, it must be presumed and intended, that their certificates were to operate generally on all the right and title, which they possessed, without reference to the mode of acquirement.

If Mrs. Gilman, or any holder of certificates, was obliged to search into the title, this estate would be attended with all the consequences and incidents of other titles ; but the difficulty was expressly intended to be avoided by the 12th act of association, which declares, that such certificate shall be complete evidence ; thereby announcing to any purchaser, that the common rules of real property were dispensed with. Shall the trustees and  
 \*203 associates now \* be permitted, contrary to their express stipulation, to depart from this rule of property, which they themselves created, and thus entrap a *bonâ fide* purchaser without notice ?

This association was not incorporated, but the parties intended, as far as they could by law, to give it those facilities, and, in some degree, to convert this real estate into personal estate. The title at law was to vest in the trustees, until *bonâ fide* sales of the land were actually made. It is the proceeds of such sales only, or money acquired therefrom, that is assured to the holders of the certificates. It is analogous to the original stock-

holders in a bank ; if one stockholder had originally deposited counterfeit money for his share in the funds, and he had afterwards sold his certificates, and new ones were granted, the new stockholder would not be affected by the false consideration. The trustees and original purchasers undertook to examine each other's title, and precluded all further inquiries in relation to it. Wetmore gave a quit-claim deed only ; the quality of his title the associates or trustees could judge of, of which they had as much knowledge as he had ; and such deed of quit-claim, whether it conveyed a good or a bad title, constituted a good consideration for the compact with the associates and trustees. It might have been, that Mr. Wetmore's title would have been good, and the other titles bad, by the non-payment of the notes of the other parties, or other cause. This hazard the parties severally sustained, in regard to each other's rights, and made a common stock of all their titles.

Was Mr. Wetmore's title, at any period, a good one ? If so, what has made it bad ? The idea of lien for the unpaid notes of the purchaser without mortgage, is unknown in Massachusetts ; and any person learned in the law would have pronounced it to have been good before the decree of the commissioners. If the doctrine of lien for the purchase-money, without mortgage, obtains in \* Georgia, the contract being made in Massachusetts, \*204 where the intention of both parties must be considered as constituting the contract, the laws of Massachusetts ought to construe such contract in preference to those of Georgia. We contend, that this doctrine of lien is only a creature of equity, and refers only to such estates or rights of real property, as are especially recognised by that tribunal, and which do not derive their support from the ordinary rules of law. The title, in order to be what is commonly denominated equitable, must be such a one, as is not recognised by law ; such as the assignment of a chose in action, which cannot be assigned by law ; or the title must be

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equitable from the inefficient mode adopted for its transfer, such as the conveyance of real estate by an instrument without seal, or by an executory contract. The conveyance of land, in this case, did not pass an equitable title merely ; but the case of *Peck and Fletcher*, and a subsequent case, in the same Court, show, that notwithstanding the Indian title be not extinguished, the freehold and seisin may be transferred ; and, in this case, the most solemn deeds and instruments, duly acknowledged, were adopted for the conveyance of the title ; and it is sustained by every legal form. Even in Courts of Equity, this lien is only raised by implication ; and where other circumstances resist this implication, showing that the parties did not mean to rely on the estate sold, for security, such lien was waived. This transaction is filled with circumstances repugnant to such implication. The design of the parties to sell the land, instead of cultivating the same, whereby to pay the notes, expressly excludes the idea of such a lien ; as no man would have purchased, who knew that such a note was given for the first purchase, without seeing that his money was appropriated to extinguish the notes ; and the strongest circumstance, to repel such a lien for the consideration, consists in this, \*205 that the sum of five dollars only is expressed \* as the pecuniary consideration. Any purchaser, therefore, making inquiry concerning the purchase-money's being paid or not, is at once checked in the pursuit ; and we call on the defendants to show any case of lien for the purchase-money, where the sum is not expressed in the deed of sale. Such nominal consideration and concealment of the true one, seems to be properly inserted in order to waive such lien. It is also a doctrine in equity, that the vendee has a lien on the land, in case the title be defective and proper conveyance not made to him, thus making the right reciprocal. But in this deed express provision is made, that the consideration-money shall not be refunded by the vendor for any cause whatsoever ; thus essentially distinguishing the present case

from those, in which such lien is maintained. It is said, that the commissioners, having a right to decide upon adverse titles, here conclusively decided on our claims; but this we deny, as the adverse titles or claims, on which they were to decide, were adverse claims to the stock from the treasury of the United States, and between such persons, as released their claims to the United States. Mrs. Gilman did not release any claim to the United States, or demand any money from the treasury; of course her rights or claims could not be adjudged by the commissioners. Her claim is not on the government, but on her associates and trustees.

The commissioners were bound to decide, to whom the money or stock from the treasury should be paid; not the use the receiver should afterwards make of that money, or the obligations he might be under in relation to it. Suppose Steward and Michael had never applied to the commissioners, or released their claims on the scrip, but had called on the directors as the plaintiff does, what opinion or decree of the commissioners would have been known on this subject? And shall such a casual circumstance affect her rights? Decrees of law affect only those who are parties \* to the suit, and an opinion incidentally given by the commissioners, ought not to control the plaintiff's right. \*206

This money, except a very small sum, was delivered to the directors as such, for the use of the members, as much as one year previous to the declaration of the sentiments of the commissioners on this subject. The rights of Mrs. Gilman, with respect to the money, vested in her, when it was first received by the directors, and a subsequent opinion of the directors, in relation to the claims of Michael and Steward, cannot alter her rights. The commissioners had power to judge, whether Michael and Steward should receive any money from the treasury of the United States; but they could not decide what

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rights they had on other persons. Suppose the company had been dissolved some years past, and by a vote of the company, the trustees were directed to convey to each associate his portion of the land; could they, in such case, have conveyed to Mrs. Gilman a portion of Mr. Wetmore's interest in said land, or a portion of their own? And if of their own, which must have been the case, the same would have embraced their title, acquired from other persons; and if, on receiving such release from the trustees, or even from Mr. Wetmore, Mrs. Gilman, under this Act of Congress, had released to the United States, and the commissioners had not allowed her an indemnity, the legal title would now have vested in her; as the Act provides, that the releases shall not operate, until an indemnity is granted; whereas she has now lost her right, by consenting, that the trustees and directors should release her title. This consent was given in contemplation, and on assurance of receiving her rateable part of the funds received by the directors. They, however, hold the funds, and do not reinstate her in her former title. In short, every consideration, both in law and equity, demonstrates her right to a portion of this stock.

\*207 \*STORY J. The material questions in this case are, 1st. What is the nature and validity of the plaintiff's title to the shares, which she claims in the lands of the New England Mississippi Land Company?

2dly. Supposing it to be originally valid, is it extinguished? Or is the plaintiff estopped from asserting it, by the award of the commissioners?

3dly. If not, is she in equity entitled to claim her proportion of the certificates of the public stock, which have been received by the company under the award of the commissioners?

The estate acquired by the first grantees, Messrs. Jarvis, Newman, and Wetmore, under the conveyance to them by the Georgia Mississippi Company, was beyond all question a legal,

and not merely an equitable estate in fee simple. By the subsequent conveyances, first to the respective purchasers, and next by them to the trustees, Messrs. Jarvis, Newman, and Hull, a legal estate in fee was also conveyed ; so that the latter became seised of the whole tract of land in fee, subject to the terms, conditions, and trusts, stated in the trust-deed and the articles of association of the New England Mississippi Land Company. The titles of all the original purchasers were acquired at the same time, under the same contract ; and, at the instant they were complete, were conveyed to the trustees in the same state, that they were acquired, *uno flatu*. There is no pretence of any intermediate incumbrance, unless there was a lien for the purchase-money ; a point, which will hereafter be considered ; and to the extent of that lien, if any, it must be admitted, that the holders of the scrip or shares under the articles of association cannot place themselves in a better situation, than the trustees, who must be taken to be conusant of the facts of the original purchase. For, whether the scrip or shares are to be deemed a shifting use or trust, or personal property, notice to the trustees, \*who hold the legal estate, affects and binds all, \*208 for whom they originally held, or have, upon the transfer of the shares, continued to hold.

But the material consideration is, whether, in virtue of the articles of association, and the conveyances made in pursuance thereof, the original purchasers, and those claiming by assignments under them, are to be considered as holding strictly and exclusively under the original titles of the original purchasers ; or whether the whole lands are to be considered as thrown into a common stock, and the scrip-holders are entitled to an undivided portion of the whole stock under the company itself. And, upon the best consideration, which I can give the subject, it does seem to me, that the latter is the true interpretation of the acts of association. The original purchasers were conusant

of each other's titles; and mutually agreed to the articles of association, and to the manner, in which the conveyances should be made, before their titles were complete. They agreed to release to the trustees their respective rights and titles in the whole lands included in the purchase; and that the trustees should hold the aggregate amount, to be disposed of, not as a several trust of the respective purchasers, but as the joint stock of the company itself. To be sure, the purchasers were to take certificates of shares according to their original proportions in the purchase; but, in this respect, the case is not distinguishable from that of subscribers to a Bank, or Insurance Company, who contribute a certain amount of the capital stock, and become entitled to a similar amount of shares. Yet no person ever imagined, that they were holders of the specific money paid in; and, if their title to that money should be impugned, that the holder under them lost his right to the shares transferred to him. The only remedy, that would remain, would be personal against the original subscribers for a failure of their titles. In

\*209 the present case, upon the conveyance to the trustees, \*each purchaser (excepting Messrs. Wetmore, Jarvis, and Newinan) covenanted personally with the trustees, for his own share of the land, against incumbrances. And in case of such incumbrance (which, except from an implied lien for the purchase-money, could scarcely, from the circumstances of the case, by possibility arise), a personal remedy was provided under the covenant. After a very careful examination, I am unable to perceive throughout the whole articles the slightest allusion to any stipulation, by which the proprietors of scrip or shares were to hold, not under the company, but under the original purchasers; and were to be affected by all the circumstances, that might affect the original grant of the land to them. On the contrary, the very certificates of shares, which on their face carry an assignable quality, and the provision, "that they shall



be complete evidence to the legal holder of his right in the purchase," or stock, as well as the manifest objects of the association, in my judgment require, that the whole stock should be deemed to belong to the company in its aggregate capacity; and that every scrip-holder should be held to take a specific proportion, not of the specific stock of an original purchaser, but of the common stock of the company itself. And if the association had been incorporated, instead of being voluntary, under similar articles and conveyances; I am at a loss to conceive, how it would be possible to sustain a different proposition. The fact of the association being voluntary, and not incorporated, cannot in a legal view change the construction, which the articles would otherwise require. On examining the articles, it will at once be seen, that the principal objects of the association were, to unite the several distinct interests of the purchasers into one common interest; to produce uniform and simultaneous efforts to enhance the value of the property; to prevent the injurious competitions and collisions arising from individual and separate negotiations; to provide a \*common fund for all \*210 expenses, and a uniform mode of selling the property for the general and common benefit of all the proprietors; and to give a negotiable quality to the stock or property, which, without impairing the great objects of the association, might facilitate the transfer of shares in the property, and give it a marketable value. For these purposes, the entire management and control of the whole funds or property were given to a board of directors, with full authority to dispose of the same at their sole pleasure and discretion. Taxes were to be levied *pro rata* on all the proprietors; and their shares in the stock were held responsible for the payment. The moneys received upon every sale of any portion of the property were to be distributed among all the proprietors according to their shares; and the evidence of their title to any shares was to be vouched, and solely vouched by certifi-

cates, to be issued from time to time by the trustees, in a form prescribed in the articles. The negotiability of the stock itself would have been materially impaired by the supposition, that each successive holder was bound to trace up his title, through his own vendor, to the first and original purchaser ; and to ascertain, what were the rights and liabilities of such purchaser, and of all the intermediate holders from the origin of the title. Such an inquiry would at all times have been difficult ; and, from its involving *matters en pais*, must have been in most cases very unsatisfactory in its result. If with these considerations we combine the form of the certificate itself, which states the shares of the proprietor, and the manner in which he is to hold them, without any notice of, or reference to, the title of any original purchaser from whom they are derived ; and the declaration of the articles, that it is to be complete evidence of title ; it is difficult to resist the impression, that the company must have meant, that the certificate should be conclusive evidence of title in the holder of his shares, not in the stock of any \* individual original purchaser, but in the common stock of the company itself. In short, that the whole property was an aggregate fund belonging to the company in its collective capacity, and that each proprietor held his shares under the company's grant, and in no other manner. My judgment accordingly on this point is, (though with the greatest deference for a different judgment pronounced by another tribunal) that the plaintiff held 60,000 acres of the common capital stock of the company, and not of the specific acres originally purchased by Mr. Wetmore. The title to the whole tract of land belonging to the company has, under the Act of Congress, been lawfully released by the company or its agents to the United States, and the plaintiff's portion included in that release. Of that act she does not, and, indeed, has no right to complain, because it is in strict conformity with the articles of association. What she claims is, to receive her proportion, according to her

interest, of the certificates of public stock received by the company under the award of the commissioners, as an indemnification for that release.

The objections urged by the defendants against this claim are,

1st. That the award of the commissioners is conclusive upon the subject matter of the claim, and that the plaintiff is thereby estopped to assert it.

2dly. Supposing the award of the commissioners is no estoppel; still it is right upon principles of equity, and that therefore, under all the circumstances of the case, the plaintiff has no right to sustain the present suit.

In respect to the accuracy of the grounds, upon which the commissioners have made their award, it certainly behoves this Court to speak with the utmost diffidence. Although the written opinion, containing those grounds, is before this Court; yet some facts are stated, which have no existence in this cause, and references are made to \*others in so indistinct and general a \*212 manner, that it is not easy to ascertain the precise nature or bearing of them. What I shall therefore say in respect to that award will refer rather to principles of law, than conclusions of fact, and always with this reserve, that I shall only discuss these principles with reference to the facts of this cause, and upon the supposition, that they are not inconsistent with what appeared before the commissioners. I own, that there are some things in the written opinion of the commissioners, which I do not perfectly comprehend. When it is stated, that "the Board has expressed an opinion, that the vendors in this case conveyed only an equitable title," (and by the vendors I understand them to mean the Georgia Mississippi Company) I am somewhat at a loss to know, what meaning is to be attached to the language. If there is any point in the case, which is free of doubt, this seems to be that point. That the State of Georgia was seised in fee simple, and had a capacity to convey, notwithstanding the non-extinguishment

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of the Indian title, is completely established by the case of *Fletcher v. Peck*.<sup>1</sup> And that a grant by a State of its own lands conveys a seisin to the grantees without further act or ceremony, is as distinctly established by the case of *Green v. Lister*.<sup>2</sup>

By the grant, therefore, from the State of Georgia, the Georgia Mississippi Company became seised in fee simple of the whole tract of land; and that company legally conveyed that fee simple to Messrs. Jarvis, Newman, and Wetmore, and they again conveyed the same to the trustees. It seems to me, therefore, extremely difficult to sustain this opinion of the commissioners upon any principles of law, which have occurred to me in the course of this investigation.

The doctrine, that a lien exists on the land for the purchase-money, which lies at the foundation of the decision \* of the commissioners, as well as of the present defence, deserves a very deliberate consideration. It can hardly be doubted, that this doctrine was borrowed from the text of the Civil Law;† and though it may now be considered as settled, as between the vendor and the vendee, and all claiming under the latter with notice of the non-payment of the purchase-money; yet its complete establishment may be referred to a comparatively recent period. Lord *Eldon* has given us an historical review of all the cases,<sup>3</sup> from which he deduces the following inferences. First, that, generally speaking, there is such a lien. Secondly, that in those general cases, in which there would be a lien, as between vendor and vendee, the vendor will have the lien against a

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<sup>1</sup> 6 Cranch R. 86.

<sup>2</sup> 8 Cranch R. 229.

† "Quod vendidi, non aliter accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione." — Dig., Lib. 18, tit. 1. l. 19. Domat, Lib. 1, tit. 2, § 3, l. 1.

<sup>3</sup> *Mackreth v. Symmons*, 15 Ves. R. 329.

third person, who had notice, that the money was not paid. These two points, he adds, seem to be clearly settled; and the same conclusion has been adopted by a very learned chancellor of our own country.<sup>1</sup> The rule, however, is manifestly founded on a supposed conformity with the intentions of the parties, upon which the law raises an implied contract; and therefore, it is not inflexible, but ceases to act, where the circumstances of the case do not justify such a conclusion. What circumstances shall have such an effect, seems indeed to be a matter of a good deal of delicacy and difficulty; and the difficulty is by no means lessened by the subtle doubts and distinctions of recent authorities. It seems, indeed, to be established, that *prima facie* the purchase-money is a lien on the land; and it lies on the purchaser to show, that the vendor agreed to waive \*it;<sup>2</sup>\*214 and a receipt for the purchase-money, endorsed upon the conveyance, is not sufficient to repel this presumption of law. But how far the taking a distinct security for the purchase-money shall be held to be a waiver of the implied lien, has been a vexed question.

There is a pretty strong, if not decisive current of authority, to lead us to the conclusion, that merely taking the bond, note, or covenant of the vendee himself for the purchase-money, will not repel the lien; for it may be taken to countervail the receipt of the payment usually endorsed on the conveyance.<sup>3</sup> But where a distinct and independent security is taken, either of

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<sup>1</sup> *Garson v. Green*, 1 Johns. Ch. R. 308.

<sup>2</sup> *Hughes v. Kearney*, 1 Sch. & Lef. R. 132. *Mackreth v. Symmons*, 15 Ves. R. 329. *Garson v. Green*, 1 Johns. Ch. R. 308.

<sup>3</sup> *Hughes v. Kearney*, 1 Sch. & Lef. R. 132. *Nairn v. Prowse*, 6 Ves. R. 752. *Mackreth v. Symmons*, 15 Ves. R. 329. *Blackburn v. Gregson*, 1 Bro. C. C. R. 420. *Garson v. Green*, 1 Johns. Ch. R. 308. *Gibbons v. Baddall*, 2 Eq. Cas. Abr., 682. *Coppin v. Coppin*, 2 P. Will. R. 291. Cases cited in Sugden on Vendors, ch. 12, p. 352, &c.

property or of the responsibility of third persons, it certainly admits of a very different consideration. There, the rule may properly apply, that *expressum facit cessare tacitum*; and where the party has carved out his own security, the law will not create another in aid. This was manifestly the opinion of Sir William Grant in a recent case; where he asks, "If the security be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien?" And he then puts the case of a mortgage on another estate for the purchase-money, which he holds a discharge of the lien, and asserts, that the same rule must hold with regard to any other pledge for the purchase-money.<sup>1</sup> And the same doctrine was asserted in a very early case, where a mortgage was taken for a part only of the purchase-money, and a note for the \*215 residue.<sup>2</sup> Lord Eldon, with his characteristic inclination \* to doubt, has hesitated upon the extent of this doctrine. He seems to consider, that whether the taking of a distinct security will have the effect of waiving the implied lien, depends altogether upon the circumstances of each case, and that no rule can be laid down universally; and that, therefore, it is impossible for any purchaser to know, without the judgment of a Court, in what cases a lien would, and in what cases it would not, exist. His language is, "If, on the other hand, a rule has prevailed, (as it seems to me,) that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence, (as it is sometimes called,) or to declaration plain, or manifest intention, (the expression used on other occasions,) of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual; it is obvious, that a purchaser taking a security, unless by evidence, manifest inten-

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<sup>1</sup> *Nairn v. Prouse*, 6 Ves. R. 752.

<sup>2</sup> *Bond v. Kent*, 2 Vern. R. 281.

tion, or declaration plain, he shows his purpose, cannot know the situation, in which he stands, without the judgment of a Court, how far that security does contain the evidence, manifest intention, or declaration plain upon that point.”<sup>1</sup>

If, indeed, this be the state of the law upon this subject, it is reduced to a most distressing uncertainty. But, on a careful examination of all the authorities, I do not find a single case, in which it has been held, if the vendor takes a personal collateral security, binding others as well as the vendee, as, for instance, a bond or note with a surety or an endorser, or a collateral security by way of pledge or mortgage, that under such circumstances a lien exists on the land itself. The only case, that looks that way, is *Elliot v. Edwards*,<sup>2</sup> where, as Lord *Eldon* says, the point was not decided; and it was certainly a case depending \* upon its \*216 own peculiar circumstances, where the surety himself might seem to have stipulated for the lien, by requiring a covenant against an assignment of the premises, without the joint consent of himself and the vendor. Lord *Redesdale* too has thrown out an intimation,<sup>3</sup> that it must appear, that the vendor relied on it as security; and he puts the case, “Suppose bills given as part of the purchase-money, and suppose them drawn on an insolvent house, shall the acceptance of such bills discharge the vendor’s lien? They are taken not as a security, but as a mode of payment.” In my humble judgment, this is begging the whole question. If, upon the contract of purchase, the money is to be paid in cash, and bills of exchange are afterwards taken in payment, which turn out unproductive, there the receipt of the bills may be considered as a mere mode of payment. But if the original contract

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<sup>1</sup> *Mackreth v. Symmons*, 15 Ves. R. 329, 342. *Austin v. Halsey*, 6 Ves. jun. R. 475.

<sup>2</sup> 3 Bos. & Pul. R. 181.

<sup>3</sup> *Hughes v. Kearney*, 1 Sch. & Lef. R. 132.

is, that the purchase-money shall be paid at a future day, and acceptances of third persons are to be taken for it, payable at such future day, or a bond with surety payable at such future day, I do not perceive, how it is possible to assert, that the acceptances or bond are not relied on as security. 'It is sufficient, however, that the case was not then before his lordship; and that he admits, that taking a distinct security would be a waiver of the lien. On the other hand, there are several cases, in which it is laid down, that if other security be taken, the implied lien on the land is gone. To this effect certainly the case of *Fawell v. Heelis*,<sup>1</sup> is an authority, however it may, on its own circumstances, have been shaken. And the doctrine was explicitly asserted and acted upon in *Nairn v. Prowse*.<sup>2</sup> In our own country, a very venerable Judge of Equity has recognised the same doctrine.

\*217 He says, "The doctrine that the vendor \* of land, not taking a security nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost."<sup>3</sup> Looking to the principle, upon which the original doctrine of lien is established, I have no hesitation to declare, that taking the security of a third person for the purchase-money ought to be held a complete waiver of any lien upon the land; and that in a case standing upon such a fact, it would be very difficult to bring my mind to a different conclusion. At all events, it is *primâ facie* evidence of a waiver; and the *onus* is on the vendor to prove, by the most cogent and irresistible circumstances, that it ought not to have that effect.

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<sup>1</sup> Amb. R. 724. S. C. 2 Dick. R. 485.

<sup>2</sup> 6 Ves. jun. R. 752. See also *Bond v. Kent*, 2 Vern. R. 281.

<sup>3</sup> *Cole v. Scott*, 2 Wash. R. 141.



Such was the result of my judgment upon an examination of the authorities, when a very recent case before the Master of the Rolls first came to my knowledge. I have perused it with great attention, and it has not, in any degree, shaken my opinion. The case there was of acceptances of the vendee and of his partner in trade, taken for the payment of the purchase-money. It was admitted, that there was no case of a security given by a third person, in which the lien had been held to exist. But the Master of the Rolls, without deciding what would be the effect of a security, properly so denominated, of a third person, held, in conformity to the opinion of Lord *Redesdale*, that bills of exchange were merely a mode of payment, and not a security. This conclusion he drew from the nature of such bills, considering them as mere orders on the acceptor to pay the money of the drawer to the payee; \*and that the acceptor was to be \*218 considered, not as a surety for the debt of another, but as paying the debt out of the debtor's funds in his hands.<sup>1</sup> With this conclusion of the Master of the Rolls, I confess myself not satisfied, and desire to reserve myself for the case, when it shall arise in judgment. It is founded on very artificial reasoning, and not always supported in point of fact by the practice of the commercial world. The distinction, however, on which it proceeds, admits, by a very strong implication, that the security of a third person would repel the lien. If indeed the point were new, there would be much reason to contend, that a distinct security of the party himself would extinguish the lien on the land, as it certainly does the lien upon personal chattels.<sup>2</sup> In applying the doctrine to the facts of the present case, I confess, that I have no difficulty in pronouncing against the existence of a lien for the unpaid part of the purchase-money. The property was

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<sup>1</sup> *Grant v. Mills*, 2 Ves. & Beames R. 306.

<sup>2</sup> *Cowell v. Simpson*, 16 Ves. jun. R. 275.

a large mass of unsettled and uncultivated lands, to which the Indian title was not as yet extinguished. It was, in the necessary contemplation of all parties, bought on speculation, to be sold out to sub-purchasers, and ultimately to settlers. The great objects of the speculation would be materially impaired and embarrassed by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain, and which might, by a subdivision of the property, be apportioned upon an almost infinite number of purchasers. It is not supposable, that so obvious a consideration should not have been within the view of the parties; and viewing it, it is very difficult to suppose they could mean to create such an incumbrance. A distinct and independent security was taken by negotiable notes, payable at a future \*219 day. There is no pretence, that the \* notes were a mere mode of payment, for the endorsers were, by the theory of the law, and in fact, conditional sureties for the payment; and in this respect the case is distinguishable from that of receiving bills of exchange, where, by the theory of the law, the acceptor is not a surety, but merely pays the money of the drawer in pursuance of his order.<sup>1</sup> The securities themselves were, from their negotiable nature, capable of being turned immediately into cash; and in their transfer from hand to hand, they could never have been supposed to draw after them, in favor of the holder, a lien on the land for their payment. But I pass over these and some other peculiar circumstances of this case, and put it upon the broad and general doctrine, that here was the security of a third person, taken as such, and that extinguished any implied lien for the purchase-money.

There is another view of this case, which enforces the opinion, which has been already expressed. The contract for the pur-

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<sup>1</sup> *Hughes v. Kearney*, 1 Sch. & Lef. R. 132. *Grant v. Mills*, 2 Ves. & Beames R. 306.

chase was originally made and executed in Massachusetts with citizens of that State, and having no tacit reference to the laws of any other State, further than that the title to the land should be conveyed, so as to be binding by the laws of that State. The first deed of the land was, in fact, executed by the vendors in Massachusetts, and the deed of confirmation in Georgia. Nothing can be clearer, than that, by the law of Massachusetts, no lien in any case whatsoever exists upon land for the purchase-money. We have no Court of Chancery to recognise and enforce such a lien ; and the peculiar principles and doctrines of Courts of Equity have never been adopted into our jurisprudence. The general rule of law certainly is, that contracts are to be construed according to the law of the place, where they are made and to be executed. Even \*contracts respecting lands, lying \*220 in another State, form no necessary exception to the rule ; for these, in many instances, both as to rights and remedies, are governed by the *lex loci contractus*.<sup>1</sup> What is the law of Georgia on this subject, I have no present means of knowing. But it does seem to me, that it will be very difficult to maintain the proposition, that a lien is to be implied upon a contract made and executed in Massachusetts, when the laws of that State repel any such right. I do not know, that it has ever been established, that a party, executing in one State a contract and conveyance of land lying in another, is to be held to reserve all the rights and remedies, which the law of the State, where the land lies, might give, and the law of the place of the contract would deny. It seems more reasonable, that the general rule of law should in such case prevail, that the contract should be construed according to the law of the place, where it is executed. But certainly when a lien is to be created upon a supposed intention of the

<sup>1</sup> *Stapleton v. Conway*, 1 Ves. 428. 3 Atk. R. 727. *Van Schaick v. Edwards*, 2 Johns. C. 355.

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Gilman v. Brown *et al.*

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parties, there ought to be, in such a case, the clearest evidence of such intention. It is not sufficient, that the vendor supposed, that he was contracting according to the law of one State, and so had a lien, if the vendee supposed the reverse, and never dreamed of a lien. Now, there is not the slightest reason to imagine, that the vendees ever contemplated a lien in the present case. The very objects of their association in the purchase would have been defeated, or embarrassed by it. No notice is pretended to have been given of such a claim by the vendors; but a distinct and independent security was taken. Under such circumstances, it seems to me irreconcilable with sound principles and justice, to establish a latent lien, which must so materially impair the rights of innocent and ignorant parties. For it \*221 is to be considered, that until the decision of \* the commissioners, no such lien was ever contemplated by the scrip-holders in Massachusetts.

Another subject necessarily connected with this cause, and of a good deal of delicacy, remains to be considered; and that is, whether the commissioners had authority to entertain any question in respect to a lien for the purchase-money; or, in other words, whether they had jurisdiction to make any award respecting the supposed equitable right of lien of the vendors of the land. The Act of Congress<sup>1</sup> authorizes the commissioners "to adjudge and finally determine upon all controversies, arising from such claims so released as aforesaid;" that is, from all claims released under the first section of the Act, or of the Acts supplementary thereto.<sup>2</sup> The word "claim" is certainly of very large signification in the law, and it undoubtedly extends to all equitable, as well as legal estates in the land released.

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<sup>1</sup> Act of 31st of March, 1814, ch. 98, § 2.

<sup>2</sup> Act of 23d of January, 1817, ch. 706. And Act of 3d of March, 1815, ch. 778.

But a person, having a lien on land, has not any estate in, or right to the land ; and it has been very correctly observed of the lien of a judgment creditor, that " he has neither a *jus in re*, nor a *jus ad rem*, and therefore though he releases all his right to the land, he may extend it afterwards.<sup>1</sup> The lien of a vendor for the purchase-money is not of so high and stringent a nature, as that of a judgment creditor, for the latter binds the land according to the course of the common law, whereas the former is the mere creature of a Court of Equity, which it moulds and fashions according to its own purposes. It is, in short, a right, which has no existence, until it is established by the decree of a Court in the particular case ; and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner, and upon its own peculiar principles.

\* It is not, therefore, an equitable estate in the land itself, although \*222 sometimes that appellation is loosely applied to it ; and it is never enforced against a subsequent *bonâ fide* purchaser of the legal estate without notice.

It is to me, in this view, matter of extreme doubt, whether it was within the jurisdiction of the commissioners ; it not being technically a claim in the land, nor, of course, the proper subject of release within the Act of Congress. It is, too, so peculiarly and exclusively the creature of a Court of Equity, that its existence cannot be safely averred independent of the decree of such a Court. And to suffer the commissioners (who are, in no correct sense, a Court of Equity) to award respecting such a lien, without the means or authority to settle all other equities between the parties, or enforce an equitable decree, could scarcely have been within the reasonable contemplation of Congress. If such a lien were asserted, it was proper matter for a

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<sup>1</sup> *Brace v. Dutchess of Marlborough*, 2 P. W. R. 491.

suit in equity, after the rights of the parties to the land itself had been adjusted under the commission.

Thus much it has become my duty to state, in respect to the merits of the proceedings before the commissioners, so far as they involve important principles of law, applicable to the present suit. If these proceedings were conclusive upon the plaintiff, I might have been spared this discussion. But I am distinctly of opinion, that they are not so conclusive. The commissioners had no right or authority to adjust or settle any claims of the plaintiff, relative to the New England Mississippi Land Company. They had a right to examine into the title of the company to the land claimed by them, and to decide upon the sufficiency of that title. But as to the shares held under the company by the plaintiff, or the rights appertaining thereto, as against the company itself, the plaintiff never submitted her claims to them; and their award would be *res inter alios acta*. The  
\*223 commissioners were not justified in severing the plaintiff's \* interest from that of the company. The trustees held the legal estate, and the directors had the sole right to dispose of it. It was the property of the company in its collective capacity, liable to its debts, and to be accounted for and settled according to the articles of association; and the individual share-holders, as such, had no authority to act in relation to it.

Upon the whole my judgment is, that the plaintiff as a holder of certain shares of the common stock of the company, and not of Mr. Wetmore, is entitled to the relief, which she claims. Whatever has been lost by the company is a general loss, occasioned, not by her default, but, as I think, by the mistake of the commissioners; and is to be borne by the whole company in proportion to their interest. She has, by the general release of the company, lost all title to the land; and is equitably and legally entitled to her share of all the stock received as an indemnification for release.

*Decree accordingly.*

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM, 1817, AT NEWPORT.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
Hon. DAVID HOWELL, District Judge.

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GARDNER LILLIBRIDGE v. ALEXANDER ADIE.

Devise by testator to his wife for life, and after her decease to his two daughters, A and B, to them, their heirs and assigns; but in case they should die without issue, that the same should go to, and vest in, their two sisters, C and D. Held, that the devise to A and B, was a *fee tail*, and not a *fee simple*, the contingency, upon which the limitation was to take effect, not being limited to a life in being, but being upon an indefinite failure of issue; and that the estate to C and D, was a vested remainder, to take effect upon the death of both A and B, without issue. That cross remainders in tail were to be implied between A and B. That, at common law, A and B would take joint estates for life, with several remainders in tail to their issue; but by the statute of Rhode Island, it would be turned into a tenancy in common, and several estates tail in possession vested in them. *Quare*, Whether C and D took estates for *life*, or in *fee*, under the will.

THIS was a real action, brought by the demandant, as son and heir of Charlotte Lillibridge deceased, to recover one undivided fourth part of a certain estate, situate in Providence. There was a special count in the nature of a formedon, to which the general issue was pleaded. At the trial at November Term, 1816, the parties agreed to the following statement of facts.

\* That Thomas Sabin, the testator, being seised of the demanded premises in fee simple, made his will, which is in the case, dated the ninth day of August, 1797; and afterwards, being seised of the same premises, died in August, 1800. And the said will was afterwards duly proved and approved on the 3d of November, 1800.

That after the death of said Thomas, Mary Sabin, the wife of the testator, entered in'o, and remained seised of, the premises in her demesne as of freehold, with remainder expectant thereon, as stated in said will, and afterwards, in January, 1805, the said Charlotte, the daughter, died, leaving the demandant, her son and sole heir at law. And afterwards, in June, 1817, the said Harriet, the daughter, died without issue. And in June, 1808, the said Mary Sabin, the mother, died. And afterwards, in 1815, the said Clementina, who was the wife of the said Alexander Adie, died, leaving issue by the said Alexander, which issue are yet alive.

And the said Mary Sabin, the daughter, is yet living. And after the death of the said Mary Sabin, the mother, the said Clementina, and the said Alexander Adie entered into the premises, and became seised of the same in right of the said Clementina; and after her death as aforesaid, the said Alexander Adie, the defendant, remained seised of the premises, claiming the same as tenant by the courtesy, and the other defendants hold as tenants under said Adie.

The above statement of facts was agreed by the parties to be in the nature of a special verdict. If the Court thereon should be of opinion, that the plaintiff was entitled to recover, judgment to be entered accordingly; otherwise judgment to be entered for the demandants.

The material clause in the will, referred to in the statement of facts, is as follows: "I give, grant, and devise, unto my beloved wife, Mary Sabin, all that my lot, where I now dwell, with



the dwelling-house, store, and wharf \* thereon standing and being, for and during the term of her natural life ; and after her decease, to my two beloved daughters, Harriet and Clementina, to them, their heirs, and assigns for ever ; but in case they should die without issue, my will is, that the same shall go to, and vest in, their two sisters, Mary and Charlotte."

The case was argued by *Bowen* and *Searle* for the demandant, and by *Tristram Burgess* for the tenants. And after argument was continued to this term for advisement.

*Bowen*, for the demandant. We conceive the plaintiff is entitled to recover the demanded premises, upon the principle, that the devise vested an estate in fee simple in Harriet and Clementina, determinable upon the contingency of either or both dying without issue ; and in that event vesting in Mary and Charlotte by executory devise.

The first inquiry is, What was the intention of the testator ?

The second, Can this intention be carried into effect, consistently with the established rules of law ?

The obvious intention of the testator we conceive to be, that in case either or both of the first devisees died without issue living at their death, the estate of the one or of both so dying should go over to Mary and Charlotte. He clearly did not mean, as is insisted by the defendant, that Harriet or Clementina should take the part of her, who happened to die first without issue, as joint tenant ; because if such had been his intention, he would have so expressed it. By the common law, perhaps, the devise to Harriet and Clementina, to them, their heirs, and assigns, without more, would have created a joint tenancy ; but the subsequent clause, "if they should die without issue, that the same shall go to, and vest in, their two sisters, Mary and Charlotte," directly overthrows this principle. Our

\* statute, also,<sup>1</sup> decides this point, and undoubtedly makes it a tenancy in common. It will not do for the defendant to contend, that the statute was not passed at the date of the will, for the same construction must be put upon the will as at the testator's death.<sup>2</sup> The statute was passed in 1798, and the testator died in 1800; and the statute extends to all cases, where the estate had not then actually vested. The cases cited all show, that Harriet and Clementina took a fee simple contingent; and that the devise over is a good executory devise. Thus in the case of *Hughes v. Sayer*,<sup>3</sup> where there was a devise over to the survivor, in case either devisee died without children, it was held, that the testator meant a dying without children living at the death of the parent, and consequently that it was a good executory devise.

In *Pells v. Brown*,<sup>4</sup> there was a devise to Thomas and his heirs for ever, paying to his brother Richard twenty pounds at the age of twenty-one, and if Thomas died without issue, living William, then William should have the lands. The words "living William" probably had some influence at that time, in deciding the case; but we submit that from the current of authorities, without this limitation, the words "dying without issue" would have been properly construed, not an indefinite failure of issue, but a dying without issue living at the death of the first taker.

And in direct affirmance of this principle, in *Porter v. Bradley*,<sup>5</sup> Lord *Kenyon* says, "If indeed the first words, 'leaving  
\*228 no issue,' had been used, they, according to the \* opinion of

<sup>1</sup> Laws of Rhode Island, p. 272, § 8.

<sup>2</sup> *Goodman et al. v. Goodright*, 2 Burr. R. 878.

<sup>3</sup> 1 P. Williams R. 534.

<sup>4</sup> Cro. Jac. R. 590.

<sup>5</sup> 3 T. R. 143. *Wilkinson v. South*, 7 T. R. 555.

Lord *Mansfield*, in *Forth v. Chapman*, must be restrained to leaving issue at the time of his death."

Lord *Kenyon* again observes, in *Roe v. Jeffery*,<sup>1</sup> "This question, in this and similar cases is, whether, from the context of the will we can collect, that where an estate is given to A, and his heirs for ever, but if he die without issue, then over, the testator meant dying without issue living at the death of the first taker." These are the leading cases on this subject in the English books, and we find their principles have been adopted by some of the most distinguished State Courts in this country.<sup>2</sup> *Kent* Justice, in *Jackson v. Blanshan*, says, that in *Fosdick v. Cornell* the Court reviewed the leading authorities, and held that the devise over was a good executory devise, and that the true construction was, a devise over to take effect on failure of male issue during the life of the first taker. That devise too contained the technical words "heirs male of their bodies."

We are aware of the rule, that an executory devise shall be void, if it be not limited to take effect within a life or lives in being. But we conceive, that the limitation over is to take effect within the time above described. The authorities referred to decisively show, that an indefinite failure of issue was not intended. Indeed, since the case of *Pell v. Brown*, but few, if any, cases can be found to support the technical rule, that dying without issue means an indefinite failure of issue. Courts have seized the slightest circumstances to prevent its operation, when it would evidently go to defeat the intention of the testator. There is another principle which will, probably, be urged by the defendant, viz. that if a contingent estate be limited \*to depend \*229 upon a freehold, which may support a remainder, it shall be con-

<sup>1</sup> 7 T. R. 589.

<sup>2</sup> *Fosdick v. Cornell*, 1 Johns. R. 440. *Jackson v. Blanshan*, 3 Johns. R. 292. *Jackson v. Staats*, 11 Johns. R. 348. *Richardson v. Noyes*, 2 Mass. R. 56. *Ray v. Enskin*, Id. 554.

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strued a remainder and not an executory devise. This is not in our way, because here was a life estate first given to the widow with a fee after it, and the contingent limitations depend, not on the life estate, but the fee. Nor is this principle immutable, where the intention of the testator contradicts it.

Again. This contingent estate cannot take effect, as a remainder, if the first devise is a fee simple, with a limitation in fee to Mary and Charlotte, because it would be limiting a fee upon a fee, contrary to the common law, which gives birth to remainders; but may be done by an executory devise, as a testamentary disposition.

Again. There can be no doubt, that the ulterior devise over is as extensive as the antecedent one, although there are no express words of inheritance. The testator gave a fee to the first devisees, and he intended the same, in a certain event, should go to, and vest in, the last.

We have not touched the doctrine of estates tail, because the defendant put the case expressly upon the ground of a joint tenancy. If he changes his position, we pray an opportunity to answer and amend our declaration accordingly.

*Tristram Burgess*, for the tenant, contended, first. *Clementina* and *Harriet* are joint tenants, and therefore, *Clementina*, being survivor, takes all. To prove joint tenancy, see *Blackstone* on that title.<sup>1</sup> There are no restrictive words in the will. They have one interest, commencing at one time, by one title, and held by one possession.

But the statute of the State is objected. This statute was made after *Sabin* made his will, though before his death; if therefore he uses the words, which, at the time of making the \*230 will, would convey a joint tenancy, the \* words ought now to be so construed. The words "to them, their heirs and assigns for ever," always conveyed a joint tenancy. But the statute

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<sup>1</sup> 2 Blk. Com. 179.

says, that if from the words of the will it appears to be the intention of the party, that the lands should be holden in joint tenancy, they shall be so holden. Now if it appears by the will, that the testator intended, that other parts of the estate should be held as a tenancy in common, we must conclude he did not intend this should be so holden.

The will was written by a professional man. Several devises are made to several devisees, "to them, their heirs and assigns for ever," with these words added, "to be equally divided between them." These words cut off survivorship, and reduce a joint tenancy to a tenancy in common.<sup>1</sup>

The words "equally to be divided," being used in other devises in the will, and not in the devise to Clementina and Harriet, it is manifest, from the words of the will, that the testator intended the devise to Clementina and Harriet should be a joint tenancy, and not a tenancy in common.

The words of the devise are very technical, viz. "All that my estate," &c. The subject of the devise is one, "to them, their heirs," &c.; the object is one, viz. "them, their heirs," &c. expressly; and no implication of law can divide the estate, and give a part of it to the plaintiff, as heir at law of Charlotte. But if it be not a joint tenancy in Clementina and Harriet, it must be in them an estate tail; for though the words "to them, their heirs and assigns for ever," are used, yet in the condition, *heirs* seem to be restricted, by the words "issue of," to heirs of their bodies.<sup>2</sup>

\* If Clementina and Harriet took estates tail by the devise, \*231 then they also took cross remainders.<sup>3</sup> But if Clementina and

<sup>1</sup> *King v. Rumball*, Cro. Jac. R. 448. 3 Rep. 39. 3 Mod. Rep. 209.

<sup>2</sup> *Davie v. Stevens*, Doug. R. 321. *Wood v. Baron*, 1 East R. 259. Cruise, 278, sec. 20. Fearn, 350.

<sup>3</sup> *Dyer*, 303, 330. *Chadock v. Cowley*, Cro. Jac. R. 695. *Holmes v. Meynell*, Ths. Raymond R. 452. *Wright v. Holford*, Cowp. R. 31. Swinburn, 172. 4 Leon. 14.

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Harriet took cross remainders, then the plaintiff cannot take, until the deaths of Clementina and Harriet and all their issue. In the case of *Wright v. Holford*, it is said, that a limitation over in default of all the issues creates cross remainders.

But the present plaintiff claims under the clause, "but in case they (Clementina and Harriet) should die without issue, my will is, that the same shall go to, and vest in, their two sisters Mary and Charlotte." If, therefore, Clementina and Harriet do not take estates tail with cross remainders, nor take as joint tenants, they take fee simple estates; and the devise over to Mary and Charlotte is an executory devise, to take effect on failure of issue of both Clementina and Harriet. But a devise executory to take effect after a dying without issue is void.<sup>1</sup> There cannot be an executory devise after an indefinite failure of issue.

But if this be not void, as an executory devise, yet the estate cannot vest in Mary and Charlotte, until the event has happened on which it is limited to them, viz. the dying of Clementina without issue, and Harriet without issue, that is, both of them, not one only.

They have not so died, and therefore Mary and Charlotte, or their heirs, cannot now take.<sup>2</sup>

*Searle*, in reply, for the demandant. It is contended, that \*232 the two first devisees took as tenants in common. Our \* statute imposes on this devise a construction of a tenancy in common, unless a clear and manifest intention appears to the contrary. And surely nothing of the kind appears in the will. For although, in a subsequent devise, a tenancy in common is expressly given, yet it is in a distinct clause from the one in question, and I doubt

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<sup>1</sup> Fearn, 11, 321. *Vincent Lee's case*, 3 Leon. 111. *Tilbury v. Barbut*, 3 Atk. 617. *Moore v. Parker*, Ld. Raym. R. 37. *Id.* 4 Mod. 316. Fearn, 363, 364, 336. *Goodman v. Goodright*, 2 Burr. 873.

<sup>2</sup> Swinburn, 173.

whether it can be used legally to aid in the construction of it. Different clauses, or devises in a will may be used to explain each other, but in cases only, where the different clauses relate to the same devises, or the same subject matter. Besides, it is not presumable, that the testator dictated the phraseology in the clause, especially the technical words used in the latter ; and if he did dictate the technical words, it is presumed he would have dictated technical words in relation to the first clause, if he had intended a joint tenancy. It cannot be presumed, therefore, that either the testator or the scribe had any idea, that the language of the last devise would or could affect the construction of the first devise, and it ought not, of course, to affect it.

No part of the will can be called in to aid this particular devise as to this point, and it must, therefore, be decided by the rules of law ; and our statutes settle it beyond all doubt to be a tenancy in common in Harriet and Clemantina. This construction is, I think, confirmed by reflection. The testator no doubt supposed, that this was a very liberal provision for both of those daughters, and their families, and it is not presumable, that he could intend, that one should have a provision, which is large and liberal for both. If half was sufficient for one, while both lived, it would be equally so, when the other was dead.

It cannot fairly be presumed, that the testator intended entirely to disinherit the children of the daughter, who might die ; for although on the having of issue the fee simple was in such deceased daughter, yet the testator clearly contemplated a benefit thereby to the children such daughter \*might leave. He sup-<sup>\*233</sup> posed, that if his daughter left a fee simple, her children might directly or indirectly be benefited by it, and their mother would be able to provide for them. And although they took nothing from him, yet they might take from her. And hence he limited the fee simple to her on the contingency of her having issue, indicating very clearly to my mind, an expectation, that the sur-

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viving children might be benefited, as their mother's heirs, by means of the devise to her. It cannot therefore fairly be presumed, that he intended the first devisees should take as joint tenants; for if they did, the survivor would take the whole, although the deceased sister had left a large number of children. But it was, as before stated, evidently his idea and intention, that if the deceased sister had children, she should have an estate in fee simple, from which she would have it in her power to provide for them. It is contended on the other side, that admitting the two first devisees took as tenants in common, yet the second devisees cannot take the deceased sister's half. That before the devise over can take any effect at all, both the first devisees must die leaving no issue. This is a preposterous construction; and if it be a sound one, the deceased sister's half might have been in abeyance fifty years, waiting the event of the survivor's death without issue. And if she died leaving issue, it seems, that this half would have been undisposed of by the will, and remained as an intestate estate, and descended to all his heirs at law, some of whom it is very evident he never intended should have any part of this estate. The survivor could not take as tenant in common, and the second devisees could not take, as the survivor left issue. Surely there can be no foundation for such a construction. The testator clearly intended to dispose of all his estate, and by the will has legally disposed of all of it. And he has disposed of the estate in question among his four daughters,

\*234 intending that the two several devisees \* should take all or half, or none, according to the contingency of the first devisees, or either of them, dying leaving no issue. The only just exposition of the devise is, to construe it distributively throughout, viz. He gives his two daughters, Harriet and Clementina, the estate as tenants in common; but if they, or either of them, die leaving no issue, then the share of such as so die leaving no issue, is to pass over immediately to the second devisees by way of executory devise.



**STORY J.** Upon the facts in this case several important points have arisen; and as every question, touching the nature and effect of devises of real estate, materially affects the title of purchasers, we have taken time to consider them. In no branch of the law is a more cautious examination of authorities necessary; and indeed in no branch are the principles more generally built upon artificial and technical reasoning. It is quite another consideration, whether these principles were originally the most correct or equitable, that could have been adopted. It is sufficient, that they are now incorporated into the law, and cannot be separated from it without shaking the very foundations of all landed titles. We are at liberty in last wills and testaments to effectuate the intention of the testator, if by law it can be done. But in ascertaining what that intention is, the construction, which has been put upon like words, and the artificial rules, by which it is sifted and fixed in the authorities, are to be our inflexible guides, where they distinctly and pointedly apply. We are not permitted to indulge in conjectures, however plausible, as to the private intention of the party, when the law has already pronounced its own mode of investigating and deciding it.

The first question is, what is the nature and quality of the estate taken under the devise by the daughters of the testator, Harriet and Clementina? Is it an estate tail, or \* a fee simple? \*235 Is it a joint tenancy, or tenancy in common? The testator, after devising a life estate in the lands in controversy to his wife, devises it, "after her decease, to his two beloved daughters, Harriet and Clementina, to them, their heirs and assigns for ever." If the will had stopped here, there would have been no question, that the daughters took a fee simple. But the testator adds, "but in case they should die without issue, my will is, that the same shall go to, and vest in, their two sisters, Mary and Charlotte."

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It was supposed at the argument, that the words "if they should die without issue" did not mean a general failure of issue at an indefinite period of time, but a failure at the death of the first takers, or one of them. If this be the legal import of the words, it will certainly add some weight to the argument, that they do not operate to abridge the absolute fee given by the previous clause; for then the limitation over being to take effect, if at all, upon the death of a person *in esse*, might clearly be good, as an executory devise.<sup>1</sup> If, on the other hand, these words are to be construed as referring to an indefinite failure of issue, then, unless the estate be in tail only, the limitation over will be on a contingency too remote, and consequently void.<sup>2</sup> The general principle to be extracted from the authorities is, that the words "dying without issue," in reference to freehold estates, are to be construed an indefinite failure of issue, unless there be something in the context, which manifestly confines the sense to

\*236 a definite period of time. \* In respect to terms of years, and other personal estate, Courts have very much inclined to lay hold of any words to tie up the generality of the expression "dying without issue," and confine it to dying without issue living at the time of the person's decease. But in respect to freeholds, the rule has been rigidly enforced, and rarely broken in upon, unless there were strong circumstances to repel it.<sup>3</sup> The cases of

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<sup>1</sup> Fearne, Exec. Dev. 352. *Pells v. Brown*, Cro. Jac. R. 590. *Goodtitle v. Wood*, Willes R. 211, and other cases cited in *Lippett v. Hopkins*, 1 Gallis. R. 454. *Doe v. Wetton*, 2 Bos. & Pull. 324. *Jackson v. Staats*, 11 Johns. R. 337.

<sup>2</sup> Fearne, Exec. Dev. 322. *Denn v. Shenton*, Cowp. R. 410. *Chadock v. Cowley*, Cro. Jac. R. 695. *Brice v. Smith*, Willes R. 1. Com. Dig. *Devise* 5, and cases cited in *Lippett v. Hopkins*, 1 Gall. R. 454. 6 Cruise Dig. *Devise*, ch. 17, § 22, &c. Id. ch. 18, § 17, &c.

<sup>3</sup> Fearne, Ex. Dev. 357, 361. Butler's edit. 471, 476. *Crooke v. De Vandes*, 9 Ves. Jun. R. 197. *Dansey v. Griffiths*, 4 Maule & Selw. 61.

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*Porter v. Bradley*,<sup>1</sup> and *Roe v. Jeffrey*,<sup>2</sup> have gone a great way ; but they turn on distinctions, which though nice, clearly recognise the general rule. In the first case, the devise was "to my son A and his heirs and assigns, and in case he should happen to die, leaving no issue behind him, then to my wife B during her widowhood, and after her decease or marriage, to my son C, his heirs and assigns for ever." Great stress was laid upon the words "leaving no issue behind him," and upon the circumstance of there being a life estate to B, as confining the contingency to the death of A ; and the Court held, that A took a fee, and that the devise over was a good executory devise. In the last case, the devise was "to my grandson A, and his heirs for ever, but in case A should depart this life and leave no issue, then the premises should return unto his granddaughters B, C, D, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike." The Court held, that A took a fee, and that the executory devise over was good, the contingency being confined to a life then *in esse*. Great stress was laid upon the circumstance, that the granddaughters were then living, and only took estates for life. If the estates over in this last case had been in fee, it seemed admitted, that \*the \*237 other words would not have pointed to any other period than an indefinite failure of issue ; and consequently to support the limitation over it must have been held, that A took an estate tail only. In the case now before the Court, assuming that the devise over to Mary and Charlotte was in fee, there is not the slightest circumstance, from which we can infer, that the testator intended, that it should take effect (if at all) only upon the failure of issue at the death of the first devisees. In this view, it falls completely within the authorities, which pronounce the limitation over to be upon a general and indefinite failure of issue. I need not

recite these authorities ; they are numerous, and so pointed, that it is impossible to make any solid distinction.<sup>1</sup> On the other hand, assuming that the devise over gave life estates only to Mary and Charlotte (a construction, which puts an end to the demandant's claim), it does not follow, that the previous estate is at all events to be held a fee simple. That is only one circumstance, from which an intent to limit the contingency to the death of the first devisee may be inferred ; but it is not decisive as to the extent of the estate previously devised ; for such a contingency may as well be limited upon an estate tail as an estate in fee.<sup>2</sup> In *Porter v. Bradley*, Lord Kenyon said, "If the devise had been, and in case he (A,) shall die without heirs, then over," it would have given to A an estate tail. Yet in that case there was a subsequent limitation on failure of A's issue to the testator's widow for life. So in *Webb v. Hearing*,<sup>3</sup> the devise was "to A, \* my son, after the death of my wife, and if my three daughters, or either of them, do outlive their mother, and A, their brother, and his heirs, then they to enjoy the same for term of their lives ;" and it was held, that A took an estate tail only.<sup>4</sup> It may also be admitted, as is asserted by the late learned Mr. *Fearne*<sup>5</sup> that though an executory devise in tail, or in fee, to one *in esse*, after a dying without issue, is void ; yet that an

<sup>1</sup> See authorities cited *Lippett v. Hopkins*, 1 Gallis. R. 454. *Fearne*, Exec. Dev. 322, &c. (Butler's edit. 444.) 6 Cruise Dig. *Devise*, ch. 17, § 22, &c. Id. ch. 18, § 17. *Denn v. Shenton*, Cowp. R. 410. *Tenny v. Agar*, 12 East R. 253. *Dansey v. Griffiths*, 4 M. & Selw. R. 61.

<sup>2</sup> *Spalding v. Spalding*, Cro. Car. R. 185, and cases cited 1 Gallis. R. 465. *Fearne*, Exec. Dev. 308, 398.

<sup>3</sup> Cro. Jac. R. 415.

<sup>4</sup> See also *Tyte v. Willis*, Cas. Temp. Talb. 1. *Forth v. Chapman*, 1 P. W. R. 663. *Roe v. Scott*, *Fearne*, Exec. Dev. note by Powell, p. 363.

<sup>5</sup> *Fearne on Remainders*, 376. (Butler's edit. 488.)

executory devise for life to one *in esse*, to take place after a dying without issue, may be good ; because in the latter case the future limitation being only for the life of one *in esse*, it must necessarily take place during that life, or not at all ; and therefore the failure of issue in that case is confined to the compass of a life in being. But it by no means follows from this admission, that every such limitation over for life is to be construed an executory devise ; for an estate for life may well be limited to take effect after an indefinite failure of issue, in which case it is a mere vested remainder for life, after an estate tail.<sup>1</sup> What, therefore, shall be the effect of a limitation over for life to one *in esse* after a previous estate devised, which may be either an estate in fee, or in tail, depends upon the context and intention of the testator, to be collected from the whole will. It may be either a regular remainder, or an executory devise, as the intention of the testator may be best answered.

Upon a full consideration of this will, I am of opinion, that Harriet and Clementina took estates tail only, and that the devise over to Mary and Charlotte is a technical remainder, either for life, or in fee, and not an executory devise. In my judgment, the testator intended the devise over to take effect upon the regular determination of the \* preceding estate, whenever it should \*239 happen, and not merely upon the event of its happening at the death of the first devisees. It is clearly settled, that though after a limitation to A and his heirs, a devise over to a stranger, after a dying without heirs, is void, as being too remote ; yet that if such devise over be to a person, who is a relation of, and capable of being a collateral heir to, the first devisee, in that case the first devisee takes only an estate tail ; because the limitation over to a collateral heir shows, that lineal heirs only could

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<sup>1</sup> Fearn on Remainders, 148. (Butler's edit. 215, &c.)

have been intended by the testator.<sup>1</sup> But if in such a case the devise over be after a dying without issue, there the word "issue" clearly qualifies the meaning of the preceding word "heirs," and will reduce the first estate to a fee-tail, whether the devise over be to a stranger, or to a collateral heir.<sup>2</sup> These cases completely govern all cases, where the limitation is upon an indefinite failure of issue, and that as well, when the estate over is for life, as in fee.<sup>3</sup> In the present case, there is no intent appearing to make the words carry any other sense, than what they import at law, viz. an indefinite failure of issue. If so, then the estate in the first devisees is clearly an estate tail. This interpretation will be conclusively established, if cross remainders are to be implied between Harriet and Clementina, and the devise over is to take effect only upon the death of both of them without issue, a point, which it now becomes necessary to consider.

- \*240 \* The devise over, is, "in case they (Harriet and Clementina) should die without issue, then my will is, that the same shall go to, and vest in, their two sisters, Mary and Charlotte." It is argued, that Harriet and Clementina take as tenants in common, and not as joint tenants; and that the devise over

<sup>1</sup> Fearn's Exec. Dev. 350. (Butler's edit. 466.) *Porter v. Bradley*, 3 T. R. 143. *Parker v. Thacker*, 3 Lev. R. 70. *Brice v. Smith*, Willes. R. 1. *Morgan v. Griffiths*, Cowp. R. 235. *Preston v. Eagle*, Willes. R. 165. *Goodright v. Goodridge*, Willes. R. 370.

<sup>2</sup> *Denn v. Shenton*, Cowp. R. 410. *Chadock v. Cowley*, Cro. Jac. R. 695. *Brice v. Smith*, Willes. R. 1. Com. Dig. *Devise*, N. 5. *Leppett v. Hopkins*, 1 Gallis. R. 454, and cases there cited.

<sup>3</sup> *Porter v. Bradley*, 3 T. R. 143. *Webb v. Hearing*, Cro. Jac. R. 415. *Tyte v. Willis*, Cas. Temp. Talb. 1. *Forth v. Chapman*, 1 P. W. R. 163. *Roe v. Scott & Smart*, Fearn's Ex. Dev. 363, note by Powell. *Tilbury v. Barbut*, 3 Atk. R. 617. *Tenny v. Agar*, 12 East R. 253. *Dancey v. Griffiths*, 4 M. & Selw. R. 61.

ought to be construed to take effect upon the death of either of them without issue, as to the moiety of the party so dying.

At common law, if the first devisees took a fee simple, the estate would clearly be a joint tenancy in fee;<sup>1</sup> and if a fee tail, then they would be joint tenants for life, with several estates tail.<sup>2</sup> But the statute of Rhode Island of 1798 (p. 272, § 8) has altered the common law in this respect, and declared all such estates shall be estates in common, unless it shall be expressly declared, or shall manifestly appear to be the intention of the party, that the estates should be joint and not in common. There is no such express declaration or manifest intention in this will, and therefore it must be held, that the first devisees took as tenants in common. It does not however follow, that the devise over is to take effect upon the death of either of the devisees without issue, as to her moiety; for the language of the testator is, "if they shall die," not if "either of them shall die," then over to Mary and Charlotte. It is argued, that this is the necessary construction, because otherwise the estate as to one moiety might be in abeyance for fifty years, if one sister or her issue should so long survive the other sister and her issue. This supposed difficulty, however, could not occur, except upon the supposition, that the first devisees take in fee simple, and the limitation over is an executory devise; for if they take a fee tail only, then cross remainders in tail \* may well be implied between them, with a subsequent remainder to Mary and Charlotte. And I am clearly of opinion, that cross remainders in tail are to be implied between the first devisees. This construction comports with the language of the will, and the apparent intention of the testator, and stands confirmed by indisputable author-

<sup>1</sup> Co. Litt. 181. Litt. § 277.

<sup>2</sup> Co. Litt. 182, 184. Litt. § 283. 2 Vern. 545. Fearn, Centig. Rem. 27.

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ities. In *Holmes v. Maynel*,<sup>1</sup> the devise was, in effect, to my two daughters, A and B, and their heirs equally to be divided betwixt them; and in case they should happen to die without issue, then to my nephew C, and his heirs male, &c. A died without issue, B surviving, and the question was, whether C was entitled to a moiety of the land; and the Court held, that he was not, and that upon the words of the will an estate tail in remainder was given to B by implication. This case is in all material respects like the present, and has been uniformly recognised as law. It is supported by a series of modern decisions, which, so far from narrowing the implication as to cross remainders, have uniformly enlarged every presumption in their favor.<sup>2</sup>

Upon the whole, my opinion is, that Harriet and Clementina took estates in fee tail in the demanded premises, with cross remainders in tail to each in the moiety devised to the other, and an ultimate remainder in the whole to Mary and Charlotte. The only doubt, that has ever occurred to me, was upon the construction, that Mary and Charlotte took life estates only; for if they take in fee, there is nothing on which to hang a reasonable doubt; and if they took life estates only, the present demandant can have no title to recover.

Whether Mary and Charlotte took an estate of inheritance or \*242 not, it is unnecessary to decide. To pass an \* estate of inheritance by a will, there must be express words of limitation, or words tantamount.<sup>3</sup> Many of the devises, which have been held

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<sup>1</sup> T. Jones. R. 172. S. C. Pollex R. 425. T. Raymond R. 452.

<sup>2</sup> *Wright v. Holford*, Cowp. R. 31. S. C. 6 Bro. Parl. C. 156, &c. *Phipard v. Mansfield*, Cowp. R. 797. *Atherton v. Pye*, 4 T. R. 710. 1 Saund. R. 185, note 6. *Watson v. Foxen*, 2 East R. 36.

<sup>3</sup> *Right v. Sidebotham*, Doug. R. 759.



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to pass life estates only, seem much more strongly to point to a fee than the present.<sup>1</sup>

Let judgment be entered, that the demandant take nothing by his writ.

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<sup>1</sup> *Woodward v. Glasbrook*, 2 Vern. R. 388. *Pettywood v. Cooke*, Cro. Eliz. R. 52. *Hawkins's case*, 2 Leon. R. 129. *Roe v. Holmes*, 2 Wils. R. 80. *Roe v. Jeffrey*, 7 T. R. 589. *Foster v. Romney*, 11 East R. 594. *Dennie v. Page*, 11 East R. 603, note. *Roe v. Daw*, 3 Maule & Selw. R. 518. *Doe v. Pearce*, 1 Price R. 353. *Paice v. Archbishop of Canterbury*, 14 Ves. R. 364. *Hay v. Coventry*, 3 T. R. 83. *Doe v. Allen*, 8 T. R. 497. Com. Dig. *Devise*, n. 7. *Clayton v. Clayton*, 3 Binn. R. 476.

# CIRCUIT COURT OF THE UNITED STATES.

## Fall Circuit.

NEW HAMPSHIRE, OCTOBER TERM, 1817, AT EXETER.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN S. SHERBURNE, District Judge.

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### SILAS BULLARD v. SAMUEL BELL.

Debt lies in favor of a holder of a dishonored bank note, against a stockholder in the bank, to recover the amount of the note, under the provisions of the bank charter, making the stockholders personally liable for such note in such a case. *Seemle*, that debt lies in all cases, where a sum certain is due to the party, although it arise from a collateral undertaking.

Upon a bank note, payable to W. Pitt, or bearer, the Circuit Court has jurisdiction to enforce payment, in favor of a holder who is a citizen of another State, although it is not shown, that W. Pitt is a fictitious person, or a citizen of another State; the prohibition of the Act of the 24th September, 1789, ch. 20, § 11, not applying to such a note. A bank note payable to W. Pitt, or bearer, is in effect payable to the bearer; and, as between any *bond fide* holder and the bank, such holder is to be deemed the bearer, to whom the bank is originally liable. *A fortiori*, the holder may maintain a suit against a stockholder upon default of payment of such note under such statutable provision. The Statute of limitations of New Hampshire, (which is, in this respect, a transcript of the Statute 21 Jac. 1. ch. 16,) does not apply as a bar to an action of debt upon such statutable provision, for it is not founded upon any contract or lending without speciality.

**D**EBT on a liability created by statute. The declaration contained a variety of counts, founded on different bank notes; but the material counts were as follows:

1st Count. For that by a certain Statute of the State of New  
\*244 Hampshire, passed on the 18th day of June, \* 1806, which  
Statute now remains in full force, a certain corporation or banking

company was established, by the name of the President, Directors, and Company of the Hillsborough Bank. And in the said Statute, it is among other things enacted, that all bills issued from the bank aforesaid, and signed by the President, shall be binding on said corporation. And in the said Statute it is among other things also enacted, that if said corporation shall, at any time thereafter, divide their stock, previous to the payment of all their bills, or shall refuse or neglect to pay any of their bills when presented for payment in the usual manner, the original stockholders, their successors, assigns, and the members of said corporation, shall, in their private capacities, be jointly and severally liable to the holder of any bill or bills, issued by the said corporation, for the payment thereof, as by the record of the said Act, a copy whereof, duly authenticated, is here in Court to be produced, at large appears. And the said Samuel Bell, on the 17th day of October, 1806, was, for a long time before had been, and ever since hath been, and now is, an original stockholder in the said bank, and a member of the said corporation, and subject to the liabilities by the said Statute created, to wit, at Chester aforesaid. And afterwards at Amherst aforesaid, to wit, on the day and year last above-mentioned, the President, Directors, and Company, for a good and valuable consideration then and there by them received, made, issued, and passed their certain bill or note, commonly called a bank-bill, of that date, signed by Samuel Bell, as President, and countersigned by D. Holmes, as Cashier of said corporation, for and in behalf of said corporation; and in and by the said bill, the President, Directors, and Company aforesaid, promised one W. Pitt, to pay him, or bearer, the sum of ten dollars on demand. And afterwards, to wit, on the 23d day of September, 1809, the said bill came into the hands and possession of \*the said Silas Bullard, for a\*245 good and valuable consideration, by him then and there paid. And thereafter, to wit, on the day and year last mentioned, at

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Amherst aforesaid, the said Bullard, being the lawful holder and bearer of the said bill, and exclusively entitled to receive the money due thereon, presented the same, then unpaid, at the bank, or office of discount and deposit of said corporation, in the usual manner, for payment ; and then, and there, as holder or bearer of said bill, as aforesaid, demanded of the said President, Directors, and Company, payment of the same ; whereby they became liable to pay the same bill to the said Silas Bullard according to the tenor thereof ; but the said President, Directors, and Company, well knowing all the premises, then and there refused to pay the same, and have never since paid the same or any part thereof, whereby, and by force of the Statute aforesaid an action accrued to the said Bullard, to recover and receive of the said Samuel Bell, in his private capacity, the amount of said bill and his damages by reason of the detention thereof. And afterwards, on the 18th day of October, in the year last mentioned, at said Amherst, the said Silas Bullard requested the said Samuel Bell to pay the same bill, and the interest thereon ; but the said Samuel Bell, then and there refused to pay the same, and hath never paid the same, or any part thereof ; but wilfully and injuriously neglects so to do, contrary to the form of said Statute in such case provided, and the laws of the said United States.

2nd Count. For that by a certain Statute of the State of New Hampshire, passed on the 18th day of June, 1806, which Statute now remains in full force, a certain corporation or banking company was established, by the name of the President, Directors, and Company of the Hillsborough Bank. And in the said Statute it is among other things enacted, that all bills issued from the bank aforesaid, and signed by the President, shall be binding \*246 on said corporation. \* And in the said Statute, it is among other things also enacted, that if said corporation shall at any time thereafter divide their stock, previous to the payment of all their

bills ; or shall refuse or neglect to pay any of their bills, when presented for payment in the usual manner ; the original stockholders, their successors, assigns, and the members of said corporation, shall, in their private capacities, be jointly and severally liable to the holder of any bill or bills issued by the said corporation, for the payment thereof ; as by the record of the said Act, a copy whereof, duly authenticated, is here in Court to be produced, at large appears. And the said Samuel Bell, on the 17th day of October, 1806, was, for a long time before had been, and ever since hath been, and now is, an original stockholder in the said bank, and a member of the said corporation, and subject to the liabilities by the said Statute created, to wit, at Chester aforesaid. And afterwards at Amherst aforesaid, to wit, on the day and year last above-mentioned, the said President, Directors, and Company, for a good and valuable consideration, then and there by them received, made, issued, and passed their certain bill or note, commonly called a bank bill, of that date, signed by Samuel Bell, as President, and countersigned by D. Holmes, as Cashier of said corporation, for and in behalf of said corporation ; and in and by said bill, the President, Directors, and Company aforesaid, promised one W. Pitt to pay him, or bearer, the sum of ten dollars on demand. And afterwards, to wit, on the 23d day of September, 1809, the said bill came into the hands and possession of the said Silas Bullard, for a good and valuable consideration by him then and there paid. And thereafter, to wit, on the day and year last mentioned, at Amherst aforesaid, the said Bullard, being the lawful holder and bearer of the said bill, and exclusively entitled to receive the money due thereon ; and the same bill being then and there wholly unpaid ; the said corporation \* divided their stock and funds among the several mem- \*247  
bers of said corporation, they well knowing that outstanding bills and notes to a large amount were unpaid, particularly the bill aforesaid, and intending to injure and defraud the said Bullard in

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his just rights, and claim aforesaid upon said corporation ; whereby, and by force of the Statute aforesaid, an action hath accrued to the said Bullard, to have and recover of the said Bell, in his private capacity, the amount of the said bill in this count mentioned, and his damages to be adjudged to him by reason of the detention of the same. Yet the said Samuel Bell, though requested to pay the same, to wit, at Amherst aforesaid, on the day and year last above-mentioned, and on divers other days there, hath never paid the same, but neglects and refuses so to do, contrary to the form of the Statute aforesaid, in such case made and provided, and the laws of the said United States.

3d Count. For that by a certain Statute of the State of New Hampshire, passed on the 18th day of June, 1806, which Statute now remains in full force, a certain corporation or banking company was established by the name of the President, Directors, and Company of the Hillsborough Bank. And in the said Statute it is among other things enacted, that all bills issued from the bank aforesaid, and signed by the President, shall be binding on said corporation. And in the said Statute it is among other things also enacted, that if said corporation shall at any time thereafter divide their stock, previous to the payment of all their bills ; or shall refuse or neglect to pay any of their bills, when presented for payment in the usual manner, the original stockholders, their successors, assigns, and the members of said corporation, shall in their private capacities be jointly and severally liable to the holder of any such bill or bills, issued by the said corporation for the payment thereof, as by the record of the said Act, a copy \*248 whereof, \* duly authenticated; is here in Court to be produced, at large appears. And the said Samuel Bell, on the 17th day of October, 1806, was, for a long time before had been, and ever since hath been, and now is, an original stockholder in the said bank, and a member of the said corporation, and subject to the liabilities of the said Statute created, to wit, at Chester aforesaid.

And afterwards, at Amherst aforesaid, to wit, on the day and year last above-mentioned, the said President, Directors, and Company, for a good and valuable consideration, then and there by them received, made, issued, and passed their certain bill or note, commonly called a bank bill, of that date, signed by Samuel Bell, as President, and countersigned by D. Holmes, as Cashier of said corporation ; and in, and by said bill, the President, Directors, and Company aforesaid, promised one W. Pitt to pay him, or bearer, the sum of ten dollars on demand. And afterwards, to wit, on the 23d day of September, 1809, the said bill came into the hands and possession of the said Silas Bullard, for a good and valuable consideration, by him then and there paid. And thereafter, to wit, on the day and year last mentioned, at Amherst aforesaid, the said Bullard, being the lawful holder and bearer of the said bill, and exclusively entitled to receive the money due thereon, presented the same then unpaid, at the bank, or office of discount and deposit of said corporation, in the usual manner, for payment, and then and there, as holder or bearer of said bill as aforesaid, demanded of the President, Directors, and Company payment of the same, whereby the said President, Directors, and Company became liable, and then and there refused to pay the same to the said Silas Bullard. And afterwards, to wit, on the 12th day of August, 1811, the said Silas Bullard, having brought his action upon the said note or bill, recovered judgment thereon, before *Seth Wheeler*, Esq. one of the justices of the peace within and for the county \* of Hillsborough, in said State \*249 of New Hampshire, duly commissioned and authorized there, to take cognizance of said action, for the sum of eleven dollars and nine cents damage, and ten dollars and fifty cents, costs of suit, as by the record of said judgment, a copy of which, duly authenticated, is here in Court to be produced, fully appears ; which judgment is now in full force and not annulled, reversed, satisfied, or appealed from, of all which the said Samuel Bell had due

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notice; whereby, and by force of the Statute aforesaid, an action hath accrued to the said Bullard, to have and recover of the said Samuel Bell, in his private capacity, the said several sums, amounting to the sum of twenty-one dollars and fifty-nine cents, and his damages, by reason of the detention of his said debt, to be adjudged to him. Yet, though requested to pay the same judgment or bill, the said Samuel Bell refuses and neglects to pay the same, contrary to the form of the Statute aforesaid, in such case provided, and the laws of the United States.

At the last May Term of the Court, a motion was made by *Mason and Smith* for the defendant, to dismiss the suit, for want of jurisdiction; and they contended, that the case fell within the exception as to promissory notes and choses in action, in the 11th section of the Judicial Act of 24th of September, 1789, ch. 20.

They argued in substance as follows. The Courts of the United States, having only a limited jurisdiction, the rules applicable to inferior Courts as to jurisdiction, have been applied to them. The plaintiff must state all that is necessary to give jurisdiction. This is an action by an assignee to recover the contents of a promissory note. Judgment and satisfaction would be payment of the note, and the bank would thereby be discharged.

- \*250. \*The declaration describes a note payable to W. Pitt or bearer, and states, that the bank on a certain day (17th of October, 1806,) for a valuable consideration, made, issued, and passed the same note; and that afterwards, to wit, on the 23d of September, 1809, the same note came into the possession of the plaintiff, for a valuable consideration by him then and there paid. It is necessarily to be inferred from the declaration, that the bank delivered the note to some person other than the plaintiff; and it does not appear, that such person could maintain an



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action in this Court. Perhaps the plaintiff might have declared otherwise, and stated enough to have maintained the jurisdiction. The plaintiff is an assignee within the meaning of the Statute. A note payable to A B, or bearer, is assignable by delivery. The delivery of such notes is an assignment, as much as an endorsement is of notes payable to order.<sup>1</sup> In a declaration on a note payable to bearer, the averment is, "A B assigned over and delivered the note to the plaintiff."<sup>2</sup> If in case of notes and bills payable to bearer, it is held, that no averment concerning the original party is necessary, all such notes and bills may be sued in the Courts of the United States, which was not the intention of the Statute; and they farther cited *Montalet v. Murry*.<sup>3</sup>

*Pitman* and *D. Davis*, for the plaintiff. The suit is within the jurisdiction of the Court. The parties are citizens of different States; and if the case be within the exception of the 11th section of the Statute, it is for the defendant to make it out by plea. But this case is not within the exception. The bank notes were in effect payable to bearer; and it is not averred in the declaration, that \*they were even passed to "W. Pitt." In \*251 point of fact we all know it is otherwise; and the name in the notes is merely formal. All bank notes are made payable to some person or bearer, but it never was supposed, that any such person had an interest in the bill. But the present action is not founded on the bank note; that is merely inducement to the action. The plaintiff had no right of action against the defendant, until after a demand made by him at the bank, and a refusal of payment. The liability of the defendant to pay the plaintiff is an original liability created by Statute, and not by an assignment. The plaintiff is not suing as assignee of the note. A bank note

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<sup>1</sup> Kyd on Bills, 40. Chitty on Bills, 115.    <sup>2</sup> Chitty on Bills, 245.

<sup>3</sup> 4 Cranch R. 46. *Sere v. Pitto*, 6 Cranch R. 332.

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is very different from a common promissory note. It passes by delivery, and is considered as cash. There can be but two original parties to a bank note, the bank itself and the bearer. "W. Pitt" is a mere fictitious party, and had no right to assign the note.

STORY J. The language of the 11th section of the Judicial Act<sup>1</sup> is, "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made; except in cases of foreign bills of exchange." Assuming that Congress have authority under the Constitution to create such an exception in suits between citizens of different States (upon which, if the question were new, I should entertain great doubt, though authorities have certainly gone a great way to recognise it<sup>2</sup>); yet to bring the case within the exception, the action must not only \*252 be founded on a chose in action, but it must be \*assignable; and the plaintiff must sue in virtue of an assignment. A note payable to bearer, is often said to be assignable by delivery; but in correct language there is no assignment in the case. It passes by mere delivery; and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person, who shall become the bearer. It is, therefore, payable to any and every person, who successively holds the note *bonâ fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer.<sup>3</sup> The

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<sup>1</sup> 24 Sept. 1789, ch. 20.

<sup>2</sup> 4 Cranch R. 46. 6 Cranch R. 332.

<sup>3</sup> See *Gibson v. Minet*, Lord C. B. Eyre's Opinion, 1 H. Bl. R. 606. *Grant v. Vaughan*, 3 Burr. R. 1516.

case is still stronger in relation to bank notes ; for in the common transactions of life they pass by delivery as cash. When made payable, as in the present case, to "W. Pitt or bearer," nobody supposes, that they are payable to a real person, who thereby acquires an interest in them. It is notorious, that such names are fictitious ; and the whole objects of the bank would be defeated, if the holder could not entitle himself to recover upon them, without showing an assignment, or delivery, from the fictitious person. They pass out of, and into, the bank a thousand times ; and are always understood to be payable to the bearer, whoever for the time being he may be, and to no one else. And even if "W. Pitt" were a real person in this case, it would not change the nature of the suit ; for the note would still be payable to the bearer, although he never claimed by or through "W. Pitt" ; since it is payable in the alternative, and not to "W. Pitt" absolutely. Even a payment to "W. Pitt" would be no discharge of it as against a subsequent bearer, *bonâ fide*, for a valuable consideration ; for bank notes payable to bearer, are always deemed good, while they remain in circulation, \* notwithstanding they have been presented to the bank \*253 and paid by the bank. In my judgment it is perfectly clear, that the words of the Statute were never meant to apply to notes payable to bearer. In such a case it is impossible for any Court to say, to whom in particular the notes are originally payable ; for no person *in rerum naturâ* is specified ; and they are just as much directly payable to the last, as to the first person, who answers the description of bearer. The Statute is intended to apply only to promises made to persons *in esse*, having a certain and fixed character of citizenship, or alienage ; and who might technically make an assignment, and sue and be sued.

But the present action is not founded on any assignment. It is an original action created by the Statute between the present parties, and never had any existence between any other parties.

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The debt, which the plaintiff claims from the defendant, is a sum, which the latter never owed to any other person. It is a chose in action, originally vested under the statute in the present plaintiff, and which has never been assigned. To be sure, a title to the bank notes stated in the declaration forms an ingredient in his case ; but it is not all of his case. It is but matter of inducement to his action. How then is it possible for the Court to say, that it has not jurisdiction of this case, when the parties are citizens of different States, and there never has been an assignment of the present cause of action, and the original parties in whom it first vested are before the Court ? Neither the District Judge nor myself have the slightest hesitation in overruling the motion.

The defendant then pleaded, 1st. The general issue *nil debet*. 2dly. The Statute of limitations.

To the latter plea there was a general demurrer and joinder.

\*254 \* *Pitman*, for the plaintiff, in support of the demurrer. 1st. The Statute of limitations applies only to actions of debt, grounded upon any lending or contract without specialty.

This action, we say, is not grounded upon any lending or contract, and so is not within the Statute ; or it is grounded upon a lending or contract, but not without specialty, being grounded upon a Statute, which is a specialty.<sup>1</sup> It seems, however, to be admitted, that if the action of debt lies, this case is not within the Statute.

1st. Debt lies, unless it be on account of the thing demanded ; or, 2dly, unless it be from the nature of the ground and cause of action.

1st. As to the nature of the thing demanded. This is a sum of money certain in itself, or which may be rendered certain by

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<sup>1</sup> *Jones v. Pope*, 1 Saund. R. 34. *Hodsdon v. Harridge*, 2 Saund. R. 66. *Warren v. Consett*, 2 Ld. Raym. R. 1502. Com. Dig. tit. *Tempe*, G, 15.

an averment.<sup>1</sup> In page 113, *Chitty* says, "Though debt is sustainable upon a simple contract, a specialty, a record, or a Statute, yet it lies only for the recovery of a sum of money *in numero*, and not where the damages are unliquidated, and incapable of being reduced by averment to a certainty." There is nothing, therefore, in the nature of the thing demanded which renders debt in this case improper, but, on the contrary, the nature of the thing demanded points this out as the proper form of action, unless there is something in the nature of the ground and cause of action which forbids it.

2dly. As to the ground or cause of action. The action of debt is a proper remedy, where a determinate sum of money is due from one man to another.<sup>2</sup> Anciently it was held, that the plaintiff could not recover less than he demanded, \*and this, \*255 together with the right of the defendant to wage his law, was the reason why the action of assumpsit was resorted to in preference. To support the action of assumpsit a promise was alleged, of which the debt was made the consideration, and damages were sought, for the non-performance of the promise, which damages might be less than the sum stated in the declaration. But as now a plaintiff in an action of debt can recover according to the sum due, though less than the sum demanded, and wager of law has become obsolete, there seems to be no reason, why the action of debt should not as well lie, as the action of assumpsit, in cases when a debt is due, which is made the foundation or consideration of the assumpsit. The same debt which will support an assumpsit, will also support an action without the fiction of an assumpsit. If in the present case there is such a debt due from the plaintiff to the defendant, as will be a consideration for an assumpsit, so that by this fiction the action of assumpsit can be

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<sup>1</sup> 1 *Chitty on Pleading*, 101, 113.

<sup>2</sup> 2 *Bl. Com.* 465. 3 *Ibid.* 154.

brought, the same debt is sufficient to support the action of debt. It has been said, that case is the proper action ; and the counsel for the defendant differ as to the proper form of action, whether case or assumpsit. The action of case, as contradistinguished to the action of assumpsit, is to recover damages for torts. In case, in the latter sense, the sum of money demanded in damages is neither certain in itself, nor capable of being reduced to a certainty by an averment, nor by any thing short of the verdict of the jury. In cases of torts, therefore, it is most manifest, that debt cannot lie for this reason, if for no other ; and it would seem to be equally clear, that in cases where a sum of money was due, which was certain in itself, or capable of being reduced to a certainty by an averment, that debt or assumpsit, and not case, was the proper remedy. The question then seems to be reduced to this, whether assumpsit, in the case at bar, is the  
\*256 proper action, to the exclusion of the action of debt. \* I say, to the exclusion of the action of debt ; for there is no doubt, but that in some cases, either action will lie, at the option of the plaintiff.

It seems then necessary to ascertain, what are the properties which are common to both actions, and what belong exclusively to each. To support the action of debt, it is necessary that there should be a determinate sum of money due from one person to another. This sum must be determinate in itself, or capable of being determined by an averment.<sup>1</sup>

This debt may be created by the act of the parties, or by the act of law. It is created by the act of the parties, in cases of contract ; and by the act of law, when founded on the provisions of Statutes. The action of assumpsit is founded upon a promise express or implied. In assumpsit the action rests entirely upon the promise. In debt it is founded entirely upon a sum of money

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<sup>1</sup> 1 Chitty Pl. 101, 113.

due. It is apparent, that there may be cases, where there is an express promise, which will support an action of debt; as by the payee against the maker of a promissory note for a determinate sum. There are also cases, where there is no express promise, but there being a determinate sum of money due, the law will imply a promise to pay the same, which implication of the law will be sufficient to support a declaration in assumpsit. In these cases debt or assumpsit will lie. But where there is a promise broken, but no determinate sum of money due in consequence of the promise, there debt will not lie, but assumpsit only, there being no determinate debt, until fixed by a verdict and judgment. There are also cases, in which the debt due would support an assumpsit, but from the manner in which the debt originated, as under the seal of the parties, by record, or on Statutes, assumpsit will not lie.

\* In the case at bar, the defendant is indebted to the plaintiff\*257 in a determinate sum, not originating from any express promise, or any implied promise, but from the express provisions of a Statute. If there is no debt due, there can be none, upon which an implied promise to pay can be raised; and as there is no pretence for an express promise, there can be nothing to support the action of assumpsit. If debt therefore will not lie, neither can assumpsit. If assumpsit will lie, so will debt. Debt, however, will lie, where assumpsit will not. Chitty says, "Debt is a more extensive remedy for the recovery of money than assumpsit, or covenant; for it lies to recover money due upon legal liabilities, or upon simple contracts expressed or implied, whether verbal or written, and upon contracts under seal or of record, and on Statutes, by a party grieved, or by a common informer, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty." <sup>1</sup>

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<sup>1</sup> 1 Chitty Plead. 101.

It is said, however, that the defendant's liability is of a collateral nature, and that debt does not lie against a collateral party to a bill of exchange, or a promissory note. We might safely admit all this, and yet contend that the action of debt would lie in our case. One reason, why an action of debt will not lie against a collateral party to a bill of exchange or promissory note, seems to be, that the promise creates no debt, the debt subsisting only between the original parties; and the promise by the collateral party being, therefore, not to pay any debt due from him, but to pay the debt of another.<sup>1</sup> In the case at bar, the defendant cannot be considered as a mere collateral undertaker to pay the debt of another, but to pay his own debt. The debt of the Hillsborough Bank was also, by the act of incorporation, made the debt of the individual stockholders. \* Every bill, which issued from the bank, was created, issued, and received, not merely as the bill of an incorporation, but as a promissory note of certain persons in their corporate, and in their individual capacities.

The corporation might be considered in the light of principals, the individual members as sureties; but both as original and not collateral parties to the bill. A collateral party to a bill of exchange or promissory note, is one, who becomes a party after the bill or note is created. But the individual stockholders, in their individual capacities, were parties to the bill by their act of incorporation, when the bill was created. They are not to be considered in the light of guarantors, putting their names on the back of the bill, but as sureties, whose names are mentioned in the body of the note, and who sign the bottom of the same. The signature of the President and Cashier is to be considered, not merely as in behalf of, and as the act merely of, the corporation, but in behalf of, and as the act of, each individual stockholder. Suppose,

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<sup>1</sup> *Bishop v. Young*, 2 Bos. & Pul. R. 78.



therefore, the bill had expressed on its face every thing, which the charter expresses, and each individual stockholder had signed his name to the bottom as surety, and their undertaking had been expressed in the body of the note, would it be pretended that the debt thus created would not become the debt of each, but that they were to be considered as collateral parties undertaking to pay the debt of another?

There is another reason, however, why the doctrine as applicable to an action against a collateral party to a bill or note, is not applicable to the case at bar, which is, that in the former, the sole foundation of the action is the express promise and undertaking of the collateral party; and as the debt is the debt of another, assumpsit is the only action which can be brought, and nothing can be demanded, but damages for the non-performance of the promise. In the case at bar, there is no express promise or undertaking of \*the defendant to found an action upon, unless \*259 he is to be considered as an original, and not as a collateral party; and there can be no implied promise, unless there is a debt due from the defendant to the plaintiff, for the law will not imply a promise on the part of A to pay the debt of B; and if there is a debt, then the action of debt lies, not to oblige A to pay the debt of B, but to pay his own debt. It must be evident, therefore, that it can only be in cases of express contract or assumpsit by a collateral party, that it can ever be a question, whether an action of debt will lie against him or not, for there can be no implied contract, where there is no debt; and where there is no debt due, there can be no action of debt. And it would seem to be equally clear, that where there is a sufficient debt to support an implied assumpsit, then the action of debt may be brought to recover the debt, without resorting to the fiction of an assumpsit. And the action on the case need only be resorted to, where the damages cannot be liquidated but by the verdict of a jury, or where the cause of action is *ex delicto*.

There is also a further objection to the doctrine respecting collateral liabilities, as applicable to the case at bar.

This action is not founded upon a simple contract, as in the cases of bills of exchange and notes of hand, but upon a specialty, to wit, a Statute. It is in the nature of an action given to the party grieved, who may bring an action of debt to recover the sum given him by the Statute.<sup>1</sup>

The Statute of 2 Ed. 6, cap. 13th, enacted, that if any person should take away tithes without setting forth a tenth of the same, he should forfeit treble the value of the tithes thus taken away. This Statute neither provided by what form of action, nor by whom, the said forfeiture should be recovered. But \*260 it was determined, that the party grieved, \* to wit, the proprietor of the tithes, should recover this forfeiture by an action of debt.<sup>2</sup>

The act incorporating the Hillsborough Bank provides, that in case the stockholders or the corporation take away their property, or, in other words, divide their stock previous to the payment of all their bills, the stockholders shall be liable to pay the same, jointly and severally. So far the Statutes may be considered analogous, as it respects the present question. The act of incorporation, however, provides to whom this payment shall be made, which is going farther towards the creation of a debt or debts between the present plaintiff and defendant, than the Statute of 2 Ed. 6. went to the creation of a debt between the proprietor of tithes and the person thus taking them away. Furthermore, the sum demanded in the present case is more determinate in its nature than treble the value of tithes. Again, in declaring upon the Statute of 2 Ed. 6, to recover this forfeiture, it must have been necessary to have set out as many naked facts, or matters *in pais*, as it is necessary to set out to support our action. In both cases, however, the liability and debt are created by Statute ;

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<sup>1</sup> Comyn's Dig. tit. *Debt*, A, 1. 2 Inst. 650.

<sup>2</sup> 2 Inst. 650.

and the naked facts are necessary to ascertain the amount of the debt. When ascertained the debt immediately arises and becomes due, not created by the facts, but being entirely the creature of the Statute, and having no existence in law or equity, separately and distinctly from it. Neither can any distinction in principle exist between the two cases from the consideration, that the liability in one was the consequence of the act of the defendant, and the liability in the other in consequence of the act of a third party, by attempting to make a distinction between the corporate body and the individual stockholders. The act of the stockholders in their corporate capacity must \* necessarily have \*261 been the act of individuals ; and especially, that act which tended to dissolve the corporation, and to disperse and divide its property, and which was illegal, could not have been a corporate act, but was the act of the stockholders as individuals, being a several act and not joint. If there is any foundation, however, for such a distinction, it is rather in favor of the action of debt than against it, because the action is founded, not upon any tort of the defendant, which might point to an action of the case, nor upon any collateral promise of the defendant, which might point to an action of assumpsit ; but upon the positive provisions of a Statute, which declares, that if A does not pay his debt, being a determinate sum, then it shall become the debt of A and B jointly and severally ; or if A should convey away his property to defraud his creditors, the creditors of A may recover their debts of A and B jointly or severally. If such a Statute would be constitutional, it would be difficult to bring any other action upon it, without having recourse to fiction, except the action of debt.

It has been said, that an action of debt will not lie upon all legal liabilities, or upon all Statutes.

This we are not disposed to deny ; but we say, that all legal liabilities, which are created by Statute, and which give to one

person a right to receive a determinate sum of money from another, which right is entirely founded upon the Statute, that such legal liabilities are a proper foundation for the action of debt. And this is not to be answered by saying, that debt will not lie upon collateral liabilities. All liabilities created by Statute, not merely enforced by Statute, are in their nature direct and not collateral. The Statute creates the debt directly, whenever it creates the liability, that is to say, a liability for the payment of a determinate sum; and when this liability or debt is created, to what can it be said to be collateral, unless it can be collateral to itself?

\*262 \* It has been farther said, that the nature of the action depended upon the nature of the right, and not whether the right was or was not founded upon the Statute.

We are not disposed to contend, that an action of debt can be brought to recover land, or chattels, or damages for injuries done to persons or property, though the right of action might be given by Statute. But where the right is to a determinate sum of money, there we say, if the right is created by Statute, debt is the proper form of action. And we have seen no authority, which controverts this position, but it is supported by many.

The three questions which have been raised in this case, 1st, on the point of jurisdiction, 2dly, in reference to the Statute of limitations, and 3dly, as to the proper form of action, are more nearly connected, than would at first sight appear.

1st. It has been already determined, that this was an action founded on the Statute, and not upon a bank note, so that an action would well lie against the present defendant in the Courts of the United States, where it would not lie, if founded upon the note.

2dly. This determines the question, whether the action is or is not grounded upon a specialty, so as to be or not to be within the Statute of limitations; it being admitted by the defend-

ant's counsel, that if grounded upon a Statute, it is grounded upon a specialty.

3dly. If the action is grounded upon a Statute or specialty, and is for a determinate sum, then the action of debt lies to recover the debt, which is so created.

The sum demanded is determinate; the right to this sum is expressly given by Statute, which is a specialty. Therefore the action of debt well lies, and it is not barred by the statute of limitations.

*Mason*, for the defendant, contended, 1st. That debt did not lie in this case.

\* 2dly. That the declaration did not allege those contingencies \*263 to have happened, on which, according to the true construction of the Act, the defendant was liable.

3dly. That the Statute of limitations was a bar to the action.

By this form of action the plaintiff intends to deprive the defendant of the benefit of the Statute of limitations. If the Statute of limitations cannot be pleaded to this action of debt, as the plaintiff contends, the question as to the form of action is unimportant. The action of debt never lies on a collateral undertaking or liability. It must be for the proper debt of the defendant, which raises a duty without any promise.<sup>1</sup> Debt lies against the maker of a promissory note, but not against the endorser. The reason is, it is the proper debt of the maker, but the endorser is only liable on his collateral undertaking. So it has been held, that debt lies against the drawer of a bill of exchange, but not against the acceptor, for the same reason.

The case in *Hardress* is against the acceptor. The authority of this case has been questioned in the Supreme Court of the

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<sup>1</sup> *Hardress*, 485. *Chitty on Bills*, 219, 220. *Bishop v. Young*, 2 Bos. & Pul. R. 78. 1 *Chitty on Pleading*, 94, 102, 106. *Rebourg v. Peyton*, 2 *Wheaton R.* 385.

United States, on the ground, that the acceptor's undertaking is not collateral. This does not injure the case for our purpose; for it implies, that if the debt is collateral, debt does not lie. This case is cited in Comyn's Digest;<sup>1</sup> and the reason there assigned, why debt does not lie against the acceptor, is, because the acceptance binds him by the custom of merchants, but does not raise a duty.

In *Bishop v. Young* the same principle is admitted. That was debt brought by the payee against the maker; and the Court seem to rely on the acknowledgment of a consideration. \*264 Chitty states the same doctrine as to bills of exchange and notes; and says, that debt does not lie on any collateral contract.<sup>2</sup>

Where a Statute creates a liability without prescribing the form of action, the form of action must be suitable to the case. Debt does not lie for all liabilities created by Statute, any more than assumpsit, or case; the form of action follows the nature of the liability. The Statute of Anne, making promissory notes negotiable, declares both the maker and endorser liable, without giving a form of action. Debt lies against the maker, because it is suitable for his case; but not against an endorser, because it is not suitable.

Where a Statute gives a forfeiture of a sum of money, or penalty, the action of debt lies, because the Statute creates a direct debt, and a consequent duty.<sup>3</sup> But debt is not a more proper remedy upon a collateral security, than upon one created by Statute.

In this case the liability of the defendant is collateral. The note secured is not the note of the defendant, but of the bank. It is the debt of the bank, and the defendant is made collaterally liable for the default of the bank, which is the real debtor. The defendant's liability is like that of an endorser of a note;

<sup>1</sup> Com. Digest, *Debt*, B, 2, p. 368.

<sup>2</sup> 1 Chit. Pl. 94, 102, 106.

<sup>3</sup> Ibid. 104.

he is liable for the neglect of the bank to pay its debt. Although the defendant was a member of the corporation, he cannot be identified with it. They are as distinct as two natural persons.

There are pumerous instances of actions of the case on Statutes very similar to the present. Action on the case is always brought on the Statute of hue and cry, which enacts, that if the felon be not discovered, &c. "the hundred shall be answerable for the robberies done."<sup>1</sup> The liability then, \*as in \*265 our case, is collateral. The hundred is made liable for the misconduct of another.

Case lies on the riot act; which enacts, that the hundred shall be answerable for any injury sustained by the riotous destruction of buildings.<sup>2</sup> The Statute of the 8th of Anne makes it the duty of the sheriff, on his taking chattels by virtue of a *fiery facias* from leased premises, to pay the landlord one year's rent, if in arrear; and authorizes him to levy the same out of the tenant's chattels. On this Statute, case lies against the sheriff for neglecting to pay the year's rent.<sup>3</sup> Here debt was the proper action against the tenant, the proper debtor; but not against the sheriff for the collateral liability created by the Statute.

Case lies on the Statute of 9 George the 2d, against malicious maiming of cattle, and burnings, which says, "The hundred shall make full satisfaction and amends."<sup>4</sup> The Statute of 2 Edw. the 6th against carrying away tithes, says, "Under pain of forfeiture of treble the value."<sup>5</sup> And in the case of the *College of Physicians v. Salmon*,<sup>6</sup> Holt J. C. says, "Debt is a strain on that Statute. The party should rather have had an action on the Statute." Case was brought on the Statute of New Hampshire, now in question, in the Supreme Court of

<sup>1</sup> 3 Saund. 374. 1 Lil. Ent. 275.

<sup>2</sup> *Ratcliffe v. Eden*, Cowp. R. 485.

<sup>3</sup> Lil. Ent. 46.

<sup>4</sup> 3 Saunders, 378. *Allen v. Hundred of Kirkton*, 3 Wils. R. 318.

<sup>5</sup> 1 Com. Dig. 328, *Action upon Statute*, (F.) <sup>6</sup> 1 Ld. Raym. 682.

Massachusetts, and no objection made to the form of the action, either by the counsel or the Court.<sup>1</sup> And case has been brought on the same Statute in innumerable instances in the Courts in this State. *Shattuck v. Atherton*, at the Hillsborough Supreme Court, May Term, 1814, was debt on this Statute; and the Court intimated, in that case, an opinion, that debt \*266 \* would not lie; but the action was determined against the plaintiff on another point.

There is no foundation for the notion, that debt is the proper action for a liability created by Statute; nor that an action on a Statute, as used in the books, means debt. The form of action depends on the nature of the liability. Chitty's observation, that "debt lies for legal liabilities,"<sup>2</sup> if understood to include all liabilities created by Statute, when no special form of action is given, would be grossly incorrect. That is not his meaning. He cites for authority Hobart, 207, which is debt against a sheriff for money levied on a *feri facias*. Indeed the instances, where case is brought on Statutes creating a liability without prescribing the form of action, are nearly as numerous as the instances of debt.<sup>3</sup>

2dly. The declaration does not allege the contingencies to have happened on which, according to the true construction of the Act, the defendant is liable. The first count rests the liability of the defendant on the refusal of the bank to pay the note. The second, without alleging a presentment for payment, or refusal by the bank to pay, rests the liability on the corporation's having divided the stock and funds among the several members, while many notes, and this among others, were unpaid.

The true construction of the Act is, that a member shall be liable on a division of the stock, and refusal of the bank to pay,

<sup>1</sup> *Bond v. Appleton*, 8 Mass. R. 472.

<sup>2</sup> 1 Chit. Pl. 100.

<sup>3</sup> 2 Ibid. 288 - 290, *et passim*.



taking both contingencies conjunctively. There is no such privity between the individual members and the corporation, as under ordinary circumstances can make it proper or just to compel the member to pay the debt of the corporation. The member is distinct from the corporation, and has no control over it. The object of the Act was to protect individuals against eventual loss. It \*was not intended to enable the bank to dis-<sup>\*267</sup>count on the personal credit of the individual members. Banks have been incorporated to discount on landed security; but never, it is believed, on the personal security of its own members.

The Act limits the amount of the debts, which the directors may contract, in a certain proportion, to the amount of the stock, and makes the directors answerable personally for any excess. No danger was apprehended, while the debts should be kept within prescribed limits, to insure which the directors were made liable for exceeding them; unless the bank should refuse to pay, and be also unable to pay, by having divided among the members its funds. Instances have occurred of a fraudulent division of the stock of certain corporations among the members. If the object had been, to protect against the neglect of the bank to pay, when there had been no division of stock, and of course, no inability, a speedy remedy against the bank or its officers would have been given. A mere neglect to pay is not evidence of an inability. In the case of a doubtful demand, the refusal to pay might be proper and justifiable. So the division of the stock, after making suitable provision for the payment of debts, is no injury to any body. This usually takes place at the dissolution of corporations, and before all debts are paid. If the Act had intended to make the stockholders liable without a division of the stock, and while the bank was able to pay, it would surely have given the stockholders a remedy over against the bank. But the Act gives the stockholder, who shall be compelled to pay the debts

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of the bank, a remedy only against his co-stockholders by way of contribution.

If the liability is limited to the double contingency of a refusal to pay, and a division of the stock, no remedy over against the bank would be expected, as it would be of no value, the bank being insolvent. The making the stockholders liable on a division \*268 of the stock among them, and a refusal \* to pay, may be deemed necessary for the public security, and also reasonable, as the stockholders must, in such a case, have been guilty of a gross fraud. The other construction, without a necessity for it, must occasion great injustice, and therefore will not readily be supposed to have been the intention of the legislature. The stockholders being distinct from the corporation, that construction makes one person, for no cause, pay the debt of another. It was no crime to become a stockholder. Persons may become stockholders by operation of law, by the assignment of a distributive share of the estate of a deceased relative. Yet in whatever way a party becomes a stockholder, he is made answerable to an indefinite amount, and for an act, which he could not control. To avoid this manifest injustice, the disjunctive "or" must be construed to have a conjunctive meaning. No word is so often substituted for another as "or" is for "and". In 1 Peere Williams, it is said, "or" is usually put for "and". So in 2 Equity Cases Abridged, 368, in note. A sufficient reason for substituting one of these words for the other is, to avoid what would be unreasonable. In a devise in fee to A B, and in case he dies under twenty-one years of age, or without issue, devise over; "or" was construed "and". The reason assigned is, that it would be unreasonable to suppose, that the testator meant to disinherit the children born before the devisee attained to the age of twenty-one.<sup>1</sup>

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<sup>1</sup> 2 Binney, 545.

The same construction is given to this word in common law conveyances, and for the same reason.<sup>1</sup> It is the same too with Statutes. "Children whose fathers and mothers are subjects, although born beyond sea, shall not be deemed aliens." Here the word "and" is construed "or", because it would be unreasonable to suppose, that the legislature meant otherwise.<sup>2</sup>

\* Statutes are often construed contrary to the meaning of the <sup>269</sup> words used in them, in order to avoid an injustice, which the legislature could never have intended. "Judges have power over Statutes to mould them according to justice and reason."<sup>3</sup> Greater liberties seem to be taken in the construction of private, than of public Acts. Judge *Blackstone* says, that they have been held to be void, if contrary to law and reason.<sup>4</sup>

3dly. The Statute of Limitations is a bar.

It will be admitted, that the Statute bars any action, which can be brought against the bank, and yet it is contended, that an incidental liability for the same debt is not barred.

No case can be conceived, where there would seem to be more reason for a short period of limitation than the present. By the delay in bringing the action, the defendant's remedy for contribution from his co-stockholders has become of no value. They are, for the most part, dead or insolvent.

Our Statute of Limitations is copied from the English. All actions of debt, "grounded on any lending or contract without specialty shall be brought within, &c." This is an action on a contract without specialty. It is substantially an action on the note, not on the Statute. This is no more an action on the Statute, than an action against the bank to recover the contents of

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<sup>1</sup> 3 T. R. 470.

<sup>2</sup> 1 Bac. Abr. 126, *Alien*.

<sup>3</sup> 6 Bac. Abr. 378 (*H.*)

<sup>4</sup> Bl. Com. 346. *Ld. Cromwell's case*, 4 Rep. 12. 2 Vernon, 711.

the note would be. In such an action the Statute must be recited. The defendant is supposed to have contracted to perform all the duties imposed on him by the Act. The contract is implied. The endorser of a promissory note is liable on his contract; yet he makes no express contract by his endorsement to pay the money on the refusal of the maker. His liability arises out of his endorsement, as does the defendant's from becoming a stockholder.

- \*270 \* The Statute of Limitations is a bar to the action of debt on foreign judgments, because the action is founded on a contract, and the foreign judgment is not a specialty.<sup>1</sup> There is more reason for saying, that the action is founded on a contract, than that the action on a foreign judgment is. The English cases on this clause of the Statute of Limitations rest on a narrow construction of the Statute, and on reasoning, which is not very satisfactory.<sup>2</sup>

*Smith* on the same side.

1st. Does debt lie?

The action of debt is not given by the Statute. Statutes sometimes give debt, where, upon common law principles, it is not the proper action. But Statute makers have a right, in such cases, to be wrong, and the action prescribed must be resorted to. Where a Statute gives a right of action, and does not say what action, the common law out of her abundant treasury supplies a remedy, and declares, what action lies. The nature of the case determines the form of the action.

Where a Statute enjoins or forbids, &c. under a penalty, debt lies against the wrongdoer, the party disobeying, &c. *Black-*

<sup>1</sup> *Dupleix v. De Roven*, 2 Vernon R. 540. *Hubbell v. Coudrey*, 5 Johns. R. 132.

<sup>2</sup> Ballantine on Stat. Limit. 86, *et seq.*

*stone*<sup>1</sup> considers him as having contracted to pay the penalty which he owes the injured party, or common informer, as the case may be, according to the amount, at which the Legislature has estimated the damages. The act or omission of the party implies an agreement to pay the stipulated sum. The Legislature has made it a duty, directly due from the wrongdoer to the plaintiff. If the Statute merely subjects the wrongdoer to damages, case is the proper action. In the case at bar, the bank receives \* the plaintiff's money, and promises to pay him the \*271 same sum; or the bank has received the money of A B, and promises to pay him, or whoever shall be the holder of the bill. Here the bank is the debtor, and the holder is the creditor. A debt is created by contract, and debt lies.

But the Statute goes farther. It creates a liability under certain circumstances, in certain individuals, who, independent of this special provision, are strangers to the contract of debt, &c. This liability does not resemble that of a sheriff or gaoler for an escape, &c.; that is, on the score of wrong done to the creditor. A Statute has, in certain of these cases, given debt; where it has not so done, the common law has given case, which is the proper action.

In the case at bar the defendant is in no fault, and there is no act done by him; there is no privity between him and the holder of the bill, or between him and the bank. He is a stranger to both. The debt, of which the bill is evidence, is a debt due from the bank. It is in no sense his debt. He received no consideration for it, and has made no contract, express or implied, for he is an entire stranger.

Perhaps the Statute might have arbitrarily declared, that on non-payment by the bank, every such bill should thereupon become the debt of certain individuals, the president, cashier,

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<sup>1</sup> 3 Blk. Com. 160, 161.

and stockholders ; (the learned *Matthew Bacon*, in treating of the vast power of a Statute, observes, that a Statute can do no wrong ; yet it may do some things, which seem very strange ; ) such a Statute declaration might perhaps have warranted the action of debt. But this Statute has not done so. It has merely created a liability in one man to pay the debt of another ; of a stranger to pay the debt of the bank. The common law will enforce this liability, and make it effectual ; but it will do so according to its \*272 own rules and maxims. The action is not against the \*defendant as a wrongdoer, or in favor of the plaintiff, as a party aggrieved, technically speaking.<sup>1</sup>

In the language of the books, an advantage is given to the billholder by the Statute, to recover of the defendant, in some form of action, his debt due from the bank.<sup>2</sup> It is admitted, that debt lies in certain cases of legal liabilities, and that there is no objection here on account of uncertainty in the sum.<sup>3</sup> The principle seems broad enough to embrace this case ; but it is nowhere said, that debt is the proper action to enforce all legal liabilities. It is no more true, that debt lies in all cases of legal liabilities ; than in all cases of liabilities or obligations, created *ex contractu* ; whether debt or some other action, depends on the nature of the case. The action may be debt, assumpsit, or case ; sometimes either.

Debt, as we have seen, lies for a penalty ; the duty, the liability, is direct. There is a privity of contract or *quasi* contract, where any contract can be supposed. And in all other cases, the wrong done by the defendant to the plaintiff or to the public, whom the plaintiff represents, is direct, and where the damages are uncertain, case lies.<sup>4</sup> Where the law creates a duty in one

<sup>1</sup> 2 T. R. 155, 158. 3 T. R. 104.

<sup>2</sup> Com. Dig. *Action upon Statute*, (A, 2.)

<sup>3</sup> 1 Chit. Pl. 101, *et seq.*

<sup>4</sup> Ibid. 144. 2 Saund. R. 374, n. 1.

man, on certain facts happening, to recompense another, a promise is implied from the one directly to the other, and assumpsit lies.<sup>1</sup> Our pauper causes are of this description.<sup>2</sup> Who ever thought of bringing debt in such a case? And yet the Statute makes the town chargeable; the place of settlement liable to repay the sums expended. But it is the money expended, not for the support of the defendant, but of another, the pauper.

\* If it was for the support of the defendant, debt would lie. \*273

Debt does not lie for an escape, other than that of a person in execution. The act of the defendant is wrongful and injurious to the plaintiff. The defendant is *onerabilis*, but he does not owe. He is not indebted, unless declared to be so in express terms. There must be privity to warrant debt, unless the action be *ex maleficio* for a penalty. In the case of a legacy charged on land, the devisee is liable in debt in respect of the land; he contracted to pay the debt, to make it his own, when he took the land. So it is with his alienee or tertenant. There is in these cases a privity of estate.<sup>3</sup> But debt does not lie on a collateral contract, whether the liability be created by statute or contract, but assumpsit; <sup>4</sup> for it is not the debt of the defendant.

There may be two actions at the same time, to recover the same thing, but the grounds are altogether different; one defendant is liable directly, for a debt due from himself to the plaintiff, the other is liable only collaterally, for default of the first, the real debtor. When did the sum sued for in the action at bar, become the debt of the defendant? Before the presentation to the bank? This will not be pretended. If it was once the debt of the bank, it is always so.

On a promise to pay the debt of another, although in writing debt does not lie, the defendant in such case is chargeable, but

<sup>1</sup> 1 East R. 227. 7 T. R. 36. 6 Johns. R. 1.

<sup>2</sup> Com. Dig. *Action upon Statute*, (A, 3,) and *Pleader* (C, 76.) 1 Chit. Pl. 108. 2 T. R. 28, 30.

<sup>3</sup> 2 Salk. R. 415. 6 Mod. R. 26.

<sup>4</sup> 1 Chit. Pl. 94, 106, *et seq.*

not as a debtor.<sup>1</sup> If the defendant had received money of the \*274 plaintiff, or one under whom the \* plaintiff claimed, this might create a duty, and so a debt in respect to that.<sup>2</sup>

The defendant's situation is that of an endorser; an endorser for the honor of the drawer, made so by the statute, *nolens volens*. He is a guarantor, and that merely. Here the Statute creates no greater liability than the custom of merchants; that is, the common law. An acceptor is not liable to the holder in debt,<sup>3</sup> and yet the acceptor may have funds received from the drawer, and seems to have made himself debtor. It is too late in the day to say, that debt lies against an endorser or guarantor. It is being wise above the wise men, who framed the action of debt. One would hardly look for discoveries at this day, as to an action better understood three centuries ago than now. There were moreover reasons for a latitude of application of this action in ancient times, before case and assumpsit were introduced, to prevent a failure of justice; yet it is believed, that the old cases are decidedly against the action, on facts such as are presented by the case at bar. The case nearest to this in point of circumstances, is the liability of hundredors for a robbery, on the Statute of Hue and cry; the action is case.

Debt on indebitatus assumpsit does not lie for a wager, because it is said the money becomes due in a collateral respect.<sup>4</sup>

Debt does not lie on an agreement by defendant, when the consideration was something done or delivered to another.<sup>5</sup>

2dly. Does this case come within the Statute of limitations? Is it "an action of debt, grounded on contract, without specialty?"

<sup>1</sup> Hard. 485. 1 Salk. R. 23. Cro. Car. R. 107, 193. 2 Bos. & Pul. 78. Com. Dig. *Debt*, (B.)

<sup>2</sup> 2 Bos. & Pul. R. 83, 84. Salk. R. 23. Selw. N. P. 469. 1 Cranch R. 288, *et vide* App.

<sup>3</sup> Selw. 469, cites 2 Bos. & Pul. 78. Salk. 23.

<sup>4</sup> *Walker v. Walker*, 5 Mod. R. 13.

<sup>5</sup> Com. Dig. *Debt*, (B.)



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\* This action is not *ex maleficio*. It is not for a penalty. The only charge against the defendant is the non-payment of a note made by the bank; his not paying the note of the bank. The action against the sheriff for an escape in execution is *ex maleficio*, though in form of debt, therefore not grounded on contract. The common law would not have given debt; when a Statute gives it, it does not change the nature of the transaction, or turn a pure tort into a contract. So the action of debt against the sheriff, for not paying over money collected on execution, is more than a non-feasance; it is a breach of trust, and so held not to be within the Statute.

It will be admitted, that this action is founded on a contract; but contended, that that contract is a specialty, a Statute, the last section of the Statute creating the bank. On our part it is admitted, that without this Statute there would be no duty, no liability; but the case is the same as to the action against the bank. Is this action on the Statute? The declaration states certain facts; on these the action is founded. The action is founded on that note of the bank, the contents of which it is brought to recover. On what is our action for the support of paupers founded? Not on the Statute, for then assumpsit would not lie. The cases are analogous. In both the liability is created by Statute, and by that alone. There are many similar cases. Certainly the Statute is not the foundation of the action in the same sense, that a bond, a judgment, &c. are. If so, *nil debet* would be a bad plea. The Statute merely declares the law upon certain facts; it is no more the ground of the action than the common law is the ground of the action of *quantum meruit* for labor and service performed. *Chitty* classes debt under four heads. 1st. Simple contracts and legal liabilities. 2dly. Specialties. 3dly. Records; and 4thly. Statutes.<sup>1</sup> In debt for a penalty there \*is no contract. An action founded \*276

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<sup>1</sup> 1 Chit. Pl. 475.

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on a specialty is founded on something, which, when proved, is conclusive; as a bond, judgment, penalty. Prove the facts in respect of which the penalty is given, as they are stated in the Statute, and in such case there is not much impropriety in saying, that the action is founded on the Statute. The Statute gives expressly in many cases the action of debt, when the common law would not give it; and then the action is emphatically founded on the Statute.

The foundation of the present action is an implied promise, raised by Statute on the existence of certain facts, as on the promise, which the common law raises for the work done without any agreed price. Is not the suit against an endorser founded on the note or bill? This Statute does what the party himself does in that case; it binds him to pay the note or bill on certain contingencies. This is a strong case for the Statute of Limitations. The facts, which constitute the defendant's liability, are not proved by the Statute, as a judgment proves a debt; they are matters *en pais*, as the making of the note, the presentation, the defendant's being a stockholder at the time of the refusal, &c. Is there not the same negligence in the holder of the bill, the same danger of perjury, &c. as in other cases? It is clear, that assumpsit would lie in this case, on the ground of the contract. If so, the Statute of Limitations is a good bar, and the action is not founded on the Statute erecting the bank.

But the plaintiff substitutes the word debt for case; and this deprives the defendant of the protection of the Statute of Limitations, and the action is founded on a Statute or specialty. Is not the action as much founded on a Statute in one form of declaring as in another?

It is apprehended, that little regard to system, principles, &c. has been manifested in the decisions on this subject.<sup>1</sup>

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<sup>1</sup> 1 Mod. R. 246. 2 Mod. R. 212.

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\* The Statute of Limitations may be pleaded to indebitatus assumpsit, brought against the sheriff for money levied on a *feri facias*; but it cannot be pleaded to debt. 1st. Because there is no contract; the action is *ex delicto*. This seems reasonable enough, if true. 2dly. Because the action is founded on a record-specialty. This cannot be the fact; for then indebitatus assumpsit would not lie. The true reason, why the Statute is not pleadable to debt, is, that the action is founded on tort, though the Statute gives debt; but the Court looks through the form to the substance. In 1 Modern Reports<sup>1</sup> it is stated, that the Statute of Limitations is not pleadable to an action by an attorney for his fees, because they depend upon a record here, and are uncertain. In 3 Levinz<sup>2</sup> it is held the more reasonable doctrine, that fees should not be considered as depending on record merely, because lawyers earn them in Court, or because they are officers of the Court. The good sense of the thing is, that the action, whether assumpsit or debt, is founded on the defendant's implied promise, created by the Statute. It is on contract, not on specialty. It is impossible to distinguish the present action, as to its ground or foundation, from the action for the support of paupers, which is not on specialty. If this action is on specialty, so is that.

*Davis*, (Solicitor-General,) for the plaintiff, in reply.

Two questions are presented by this demurrer.

1st. Will debt lie?

2dly. Is the Statute of Limitations a bar?

As to the objections to the form of the declaration, I cannot consider them of any weight; they are suggested by one of the opposite counsel, but not relied upon by \* either. The first of \*278 these objections is, that there is no notice to the defendant alleged, of the refusal of the bank to pay. This is not correct in point of fact. The Statute renders the defendant liable upon demand

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<sup>1</sup> 1 Mod. R. 246

<sup>2</sup> 3 Lev. 367.

of the bills at the bank, and refusal to pay. The declaration alleges this demand and refusal to have been made upon the defendant himself. It is absurd to say, after this, that no notice is alleged; no other notice is required by the Statute. The fallacy of the whole of the argument of the defendant's counsel commences here, viz. by comparing the liability of the defendant, to the liability of an endorser of a note of hand, or acceptor of a bill of exchange; and applying the principles of such a liability, to that of the defendant in the present case. The second objection to the declaration is lighter, if possible, than the first; it is, that the averment, that the bills were signed by the president, is insufficient. The allegation is, that they were signed by the defendant "as president." If this averment is not sufficient in technical strictness, it cannot be bad on general demurrer; it certainly would be good after verdict, and therefore is not bad on general demurrer to the plea. The same remark may be applied to the other objection to the declaration; that part of it, which relates to the notice, or rather the demand upon the defendant, would be good after verdict, or upon general demurrer, if it can possibly be supposed, that it is not technically correct in this respect.

As to the first point presented by the demurrer, viz. Will debt lie in this case? I shall state, 1st. the principles and authorities, upon which we ground the action; and 2dly. I shall answer the objections of the defendant's counsel.

1st. There is no case in the books precisely like this. It must be decided, therefore, upon general and analogical principles, in the application of which the Court will be astute to maintain the action, as the defence rests, not upon the merits, but merely upon the form of the action.

\*279 \*The Court will readily recognise the following principles and authorities:

Debt is a more extensive remedy than assumpsit.

If neither debt nor assumpsit lies, there is no remedy.

If either debt or assumpsit lies, it follows from the principle above stated, that debt will lie.

Debt lies upon simple contracts, either express or implied.<sup>1</sup>

The liability of the defendant, is either on a simple contract or on a specialty. If on the former, debt lies; if on the latter, debt lies beyond all doubt.

Debt lies for all legal liabilities, though there is no contract; as against a sheriff for money collected on an execution, it is *quasi ex contractu*.<sup>2</sup>

I can conceive of no difference, whether the liability is created by the common law or by Statute. That debt lies upon a liability created by Statute, cannot be doubted. Debt lies also upon a by-law, as on a specialty.<sup>3</sup>

Debt lies upon an Act of Parliament, though it is not said by whom, or by what action, it is to be recovered.<sup>4</sup>

It lies for the party aggrieved, as on the Statute regulating the practice of physic, half the penalty to the king and half to the college. It lies upon the Statute against extortion. And upon the Statute for treble value, in not setting out tithes.<sup>5</sup>

The parties aggrieved, under the above-recited Statutes, are those, to whom the forfeitures accrue. Why is not the plaintiff in this case a party aggrieved, by the non-payment of the bills, in a much stronger sense, than those, who are entitled to recover the penalties in the abovementioned Statutes?

\* Further. Debt lies upon every Statute, made for the remedy \*280 of any mischief, injury, or grievance;<sup>6</sup> nothing can be more

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<sup>1</sup> Comyn's Dig. *Debt*, (A, 9.)

<sup>2</sup> 1 Chitty on Pleading, 101. *Speake v. Richards*, Hob. R. 206.

<sup>3</sup> 1 Bos. & Pul. R. 98.

<sup>4</sup> Com. Dig. *Debt*, (A, 1.)

<sup>5</sup> Ibid.

<sup>6</sup> Com. Dig. *Action on Statute*, (A, 1.)

extensive. It lies, when a Statute gives accumulative damages to the party aggrieved,<sup>1</sup> and this is not a penal action. The cases here stated are from *Comyn's Digest*, under the title "Action on Statutes"; but the words of the authority are the same as are made use of by the same author, under the title "Debt"; which shows, that an action upon a Statute, "made for the remedy of any mischief, injury, or grievance;" or actions upon Statutes, giving "accumulative damages to the party aggrieved," may be actions of debt. This action lies also on a Statute giving a recompense. I say this action lies; for though this principle is stated in *Comyn*, under the title, "Action upon Statutes"; there can be no possible difference between an action by "a party aggrieved for an injury or grievance," (for which debt unquestionably lies) and an action for a recompense. Debt lies upon all Statutes, by the party aggrieved, where the sum demanded may be reduced to a certainty.<sup>2</sup> This principle comes up to our case. The sum demanded is the amount of the bills mentioned in the declaration, which may be "readily reduced to a certainty."

But it is not necessary to recover the precise sum demanded.<sup>3</sup> And whenever a Statute gives a right to damages, reduced to a certainty by the provisions of the Statute, debt lies, if no other remedy is pointed out by the Statute.<sup>4</sup>

These are the general principles and authorities, which, we think, will justify us in bringing debt.

\*281 \* 2. The answer to arguments and objections of the defendant's counsel. I make no answer to the objections of one of the counsel, that we have no remedy, unless there has been a division

<sup>1</sup> *Woodsal v. Knatchbull*, 2 T. R. 154. Per *Ashurst J.*

<sup>2</sup> 1 Chitty on Plead. 101.

<sup>3</sup> *Walker v. Witter*, 1 Doug. R. 6.

<sup>4</sup> *Bigelow v. Concord Turnpike*, 7 Mass. Rep. 204.

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of the stock as well as a demand at the bank ; and that the Statute creating this corporation, is against reason and good morals. I understood at the trial, that both these objections were considered by the Court as of no validity.

The arguments of both the learned counsel, so far as I understand them, are comprised in two objections. 1st, that debt does not lie, because the liability of the defendant is of a collateral nature ; and 2dly, that debt does not lie upon general principles.

As to the 1st objection. The whole support of this objection rests upon the case in *Hardres*.<sup>1</sup> I cannot contemplate a foundation more frail or baseless. In the first place, nothing is decided in that case, except that debt will not lie against the acceptor of a bill of exchange ; and the whole argument of the defendant's counsel is placed upon this ground, viz. that the liability of the defendant is similar to that of an acceptor of a bill of exchange for the honor of the drawer.

A sufficient answer to this authority is, that it has been overruled by the Supreme Court of the United States. I presume the decision of the Supreme Court was upon the ground, that the case in *Hardres* is not law. It is clear to me, that that case ought to have been decided in favor of the action, for the very reasons assigned for the decision against it. It stands alone, and wholly unsupported by any subsequent decision. It is quoted, it is true, by Chief Baron Comyn, in the same way, that he quotes every thing else from the books, out of which his Digest is compiled. But no additional sanction or authority is thereby \* given \*282 to it. It is barely referred to in the subsequent case in *Bosanquet & Puller*.<sup>2</sup> But Lord Eldon gives no opinion upon it ; barely states the result ; and in the conclusion of his opinion, leaves this question undecided. He cautiously avoids giving any opinion upon the very question decided in *Hardres*. But admitting the case in *Hardres* to be law, there is not the most

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<sup>1</sup> *Hardres*, 485.

<sup>2</sup> *Bishop v. Young*, 2 Bos. & Pul. R. 78.

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distant point of resemblance between that case and this. I shall contend in the first place, that the liability of the defendant in this case is original, not collateral. And in the second place, that it is created by a specialty of the highest nature, a public Statute ; and therefore not only that debt is the proper action, but that it is the only proper action for this liability ; and that assumpsit or case would be wholly incorrect or technical.

That the liability is original, as to the defendant, results from the nature of the instrument. This instrument is a charter, or grant, from the government to the stockholders. The government is one party, the stockholders or corporation, is the other ; hence there can be no third party, as is the case of an acceptor of a bill of exchange ; and consequently, there can be no collateral undertaking, by a third party, to pay the debt of another. The debt for which, in this case, the defendant is liable, is the bank note ; for the payment of which, the defendant is bound by the terms of the original grant or contract with the government, in two capacities ; one as a member of the corporation, the other as an individual stockholder. It is not that two persons are liable, one originally and the other collaterally for the same debt ; but the case is, that one and the same person is liable, in two different ways, for the same debt ; but both these ways, or modes of liability, are created at the same time, by the same instrument, and, what is still stronger, upon the same consideration. It is \*283 said, the reason, why \* an acceptor is liable, is because he has funds. Answer ; the defendant has the funds of the bank always in his hands. He had a full, as well as original consideration ; that of a right to make bills, and issue them as cash. These are his funds, and this a most complete and ample consideration. What constitutes a collateral liability ? It is this, that it is for the debt or the default of another. There is nothing like this in the defendant's case. When he accepted the charter, and made himself a stockholder, he became bound to pay



the bills of the bank, by an express stipulation, to which he voluntarily assented for his own benefit; and his individual credit and property were thereby pledged to the holder of the bills to fulfil this stipulation.

To apply, therefore, the principles of a collateral liability, such as a liability to pay the debt of another (which is the ground of the decision in *Hardres*, according to Lord *Eldon*) to the liability of the defendant in this case, seems to me a gross legal absurdity. What other person's debt is the defendant liable for? They say, that of the Bank. Who is the Bank? It is the defendant himself. The notes in the declaration are the notes of the defendant himself; for the payment of which his property, both corporate and individual, is originally pledged by the charter.

To these general principles, it may be added, that it would be a manifest violation of the intention of the government, and of the security intended to be provided for the public by the provisions of the charter, to suffer the defendant to escape payment, upon such distinctions as are set up for him in this defence. It is well known, that in the numerous banks, with which the public were inundated about this time, there was no security against fraud and speculation upon the credulous people, unless the ostensible and tangible property of the individual stockholders, was rendered liable for the debts of the banks.

\* But the strongest, and in my mind, the unanswerable argument in favor of our action is, that the liability of the defendant, whether it be original or collateral, is created by a speciality of the highest nature, viz. by a public Statute. I say a public Statute; for a Statute incorporating a bank, has been always held to be a public, not a private Statute.

The reason given, why the acceptor of a bill of exchange is not liable in debt is, that his acceptance or liability amounts only to a promise, but creates no debt or duty. When it is admitted

by the learned judges of the golden age (Charles 2d), that debt will lie upon simple contract, and yet that it will not lie against the acceptor of a bill of exchange, which acceptance is a simple contract, it seems difficult to understand their reasoning, and still more to be convinced by it. The fact is, that little credit is due to the opinions of the Judges of that day, upon the law of contracts, especially of commercial contracts. The improvements in this science by modern Judges, both in England and America, furnish more light in one year, than was furnished for a century, either before or since the reign of Charles 2d, by all the Judges in Westminster Hall. †

It was asserted by one of the defendant's counsel, that "debt does not lie upon a collateral undertaking, whether created by Statute or otherwise." I deny this position. And I asked for the authority, upon which it was made, but it was not produced. In my opinion, no such authority exists; if it did, it would have been produced; for it would cut up, root and branch, the strongest point in our favor.

There can be no such position in law. The remedy for all liabilities must be according to their nature. If the remedy is pointed out by law, or by Statute, it must be pursued. If it arises from analogy and general principles, it must be pursued according to, and consistently with, those principles.

- \*285 \*What if a collateral liability is created by bond or covenant under hand and seal? Will not debt lie for such a liability? Who will say that it does not? If debt does lie in such case, it is because the liability is created by specialty. Is not a Statute a specialty? The books are full and decisive, that it is. To say or to admit, therefore, that debt will lie for a collateral liability, created by one kind of specialty, viz. a bond or covenant; and deny that it will lie for a collateral liability, created by another kind of specialty, viz. a Statute of a public nature; is an absurdity, that will gain no ground in this Court. The truth is, as before suggested, no action, but the action of debt, can be

supported upon legal and technical principles and practice, for a liability created by Statute, whether such liability be collateral or original. The simple question, therefore, in this case is, Is the liability of the defendant created by Statute? It would be offensive to common sense to deny, that it is.

In order to avoid the necessary consequences of these principles, the positions taken by the defendant's counsel are untenable throughout. It is admitted, that "debt will lie against the party neglecting to perform a duty required by Statute." What is the duty required by this Statute? It is for the stockholder to pay the bills of the bank, in the case stated in the declaration. It is for the non-performance of this duty, that debt is brought in this case.

It is admitted, also, that a debt is created by the notes of the bank; but it is said, that the defendant is a stranger, independent of the Act. True, he would be a stranger, independent of the Act; but the Act has made him responsible for this debt; therefore by the Act, he is no stranger; and this action, being founded on the Act, is for that reason maintainable against him. It is also said, that this action is not by a party aggrieved; but it is admitted, that it is for a "recompense" or an "advantage." I have shown, that it \* is by a party aggrieved; and that debt will lie \*286 for such a party to recover a recompense.

The other cases are as easily answered, viz. that case is the action "in torts and wrongs by Statute." This is no case of that description. The liability of towns to maintain paupers, is referred to. We answer; these actions against towns are not on the Statute, but on the account against the town, pursued and recovered in the mode pointed out in the Statute. And above all, it is said, the Statute gives no liability beyond the custom of merchants; and that the defendant is an endorser, made so by the Statute, precisely and exactly for the honor of the drawer. How is it possible, that learning and talents can stray so out of

the legal path? I should almost be willing to admit these positions, if it were not for their manifest incorrectness. Why is the endorser or acceptor answerable? Because he has funds, or because he agreed to accept, either before or at the time the bill is drawn. Now the defendant is in both those predicaments. He had funds, the stock and property of the bank; he accepted, or became answerable, upon a full and personal consideration; and he agreed to pay the bill, in the case stated in the declaration, before it was drawn; that is, when he took his charter, and agreed to the terms of it.

One or two other cases and principles are relied upon. The Statute of Hue and cry.<sup>1</sup> No other answer to this case is necessary, than to state, that the action was in the nature of an action of trespass, as stated by Saunders; but in the original declaration, it does not appear, whether it was trespass, debt, or case. From the nature of the case, although the recompense was given by Statute, the damages to be recovered could not "easily be reduced to a sum certain." Therefore, it does not come within the reason of those cases, where it is admitted, that debt will lie.

\*287 \*The case of the *Huddersfield Canal Company*<sup>2</sup> is answered in a single word. The Statute directed the recovery to be, either "by action of debt, or on the case"; the plaintiff in that case elected case.

2. Is the Statute of Limitations a bar?

This question depends wholly upon authorities, and upon the nature of the Statute of Limitations.

This Statute is not to be favored; and is not to be extended by implication to cases not mentioned in it.

This is the case of a record, and of a specialty; the presumption, that evidence is lost (the reason of the Statute) cannot apply

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<sup>1</sup> *Pinkney v. Inhabitants of Bullard*, 3 Saund. R. 374, 379.

<sup>2</sup> 7 T. R. 36.

in this case. There is no lending, such as debt would lie for, in the case of the actual lending of money.

Debt upon an award is upon a specialty, and so not within the Statute.<sup>1</sup>

This Statute is no plea against a suit for attorney's fees, because a matter of record, which is a specialty.<sup>2</sup>

The Statute of Limitations is no bar to an action upon the Statute of 2 Ed. 6, c. 13, for not setting out tithes. Debt lies upon this Statute.<sup>3</sup>

Same case in Freeman's Reports. *North C. J.* says, the "reason why this Statute (of Limitations) is no bar, is, because it is founded on a Statute."<sup>4</sup>

The Statute of 2 Edw. 6, is a specialty, and not within the Statute of Limitations.<sup>5</sup>

If judgment should be in favor of the plaintiff, we shall claim interest ; upon which the Court will be pleased to hear us.

\* After the argument, the cause was continued for advisement. \*288  
And now, at this term, the opinion of the Court was delivered as follows :

STORY J. This cause has been argued with a diligence and ability, worthy of its importance. The learning upon the subject has been nearly exhausted ; and if the opinion, which we are now to pronounce, be not free from doubt or difficulty, it is certainly not from any neglect of counsel to furnish all the proper lights of principle and authority.

There are two questions ; first, whether the plea be a good bar to the action ; secondly, if not, whether the action itself be well brought.

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<sup>1</sup> *Jones v. Pope*, 1 Saund. R. 37.
<sup>2</sup> 2 Saund. R. 66.
<sup>3</sup> *Jones v. Pope*, 1 Saund. R. 33. *Talory v. Jackson*, Cro. Car. R. 513.
<sup>4</sup> Freeman, 237.
<sup>5</sup> Com. Dig. *Tempe*, (G, 15.)

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In respect to the first question, the Statute of Limitations of New Hampshire,<sup>1</sup> which, in this respect, is a mere transcript of the Statute of 21 Jac. 1. ch. 16, § 3, bars "all actions of debt, grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent," unless commenced within six years next after the cause of action accrued. Nothing can be clearer, than that this is not a case of lending; and it would be very artificial reasoning to consider it a case of contract. It is certainly not a case of express contract; and the most that can, by the utmost straining, be asserted, is, that it is a case arising *quasi ex contractu*.

It is in truth, however, a mere legal liability, created by Statute, which may furnish the foundation or consideration of a contract express or implied; but is not of itself a contract. The reasoning in Mr. Justice *Blackstone's Commentaries*,<sup>2</sup> on the subject of implied contracts in cases of fines, forfeitures, amercements, and judgments, is very refined and ingenious in theory; but it never has to its full extent been admitted in practice, as the \*289 foundation of legal \*remedies. If it were universally true, then indebitatus assumpsit would lie to recover a fine on a criminal sentence, or a penalty or forfeiture upon a penal Statute, which certainly cannot be pretended. And even supposing, that the law, for the sake of a remedy, would allow a party, by a fiction, to change a wrong into a contract; it does not follow, that the wrong is merged in contract, until the party has definitely bound himself to consider it exclusively in that character. If a person unlawfully converts and sells the property of another, it is properly a tort; yet the injured party may waive the tort, and bring assumpsit for the proceeds. But until he has so made his election, and created an implied contract, the wrongdoer cannot protect himself by any defence, founded upon the supposed ex-

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<sup>1</sup> Act of 16th of June, 1791.

<sup>2</sup> 3 Com. 160, 161.

istence of a contract. In the present case, the plaintiff has not declared on any contract, nor has the law necessarily created one; and, therefore, in this view, the plea cannot on principle be supported. But if it were otherwise, the Statute of Limitations applies only to contracts, not grounded on a specialty. Now, the present action is founded on a Statute, which the law deems for this purpose a specialty; and for this reason also the plea is bad. If the case were new, therefore, we should have no difficulty in overruling the plea; but the point has been directly decided by authorities, which cannot now be controverted.<sup>1</sup>

But although the plea be bad, yet if the declaration be bad also, the defendant has a right to take the exception, and judgment ought to be rendered against the party committing the first fault. Several exceptions have been taken to the declaration, on account of its inartificial structure and defective averments. I shall pass them all over, not \* because they are without foun- \*290  
dation, but because the declaration, though drawn with great inaccuracy and unskilfulness, contains sufficient matter in substance, on which, in case of a general demurrer, to found a judgment, if the action itself be rightly conceived.

And this brings us to the second question, whether debt lies in this case; a question which, though purely technical, goes to the very marrow of this cause; for under existing circumstances, if the plaintiff has not this remedy, he is probably barred of every other by lapse of time.

Many cases have been stated at the argument, in which an action of debt will lie. It is said, that it will lie upon express and implied contracts, and upon legal liabilities. This is certainly true; but it is true to a limited extent only; for it will not lie upon all simple contracts, nor upon all legal liabilities. It will

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<sup>1</sup> *Jones v. Pope*, 1 Saund. R. 37. *Hodsdon v. Hartridge*, 2 Saund. R. 61, 65. Com. Dig. *Temps*, (G, 15.) *Tulory v. Jackson*, Cro. Car. B. 513.

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not, for instance, lie upon a mere simple contract to indemnify a party, or to do any other act or thing, except to pay money or deliver goods.

In respect to liabilities or rights created by Statute, where no specific action is given, debt is often a proper, but is by no means a universal remedy. It is very correctly laid down by Chief Baron *Comyn*,<sup>1</sup> that upon every Statute made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the Statute or by implication; and that such action shall be a recompense to the party. But the action here spoken of is not any one specific remedy; but an action adapted to the nature of the case, and moulded according to the forms and distinctions of the common law. It may be an action of debt, or assumpsit, or trespass, or case, as the particular nature of the wrong or injury may require. For \*291 instance, Lord *Coke* informs us, that upon \* the Statute of Magna Charta,<sup>2</sup> which enacts, that no free man shall be arrested or imprisoned, &c. unless by the law of the land, if any be imprisoned contrary to law, he may have an action founded upon this Statute.<sup>3</sup> No person can suppose, that debt or assumpsit would here be a proper form of action; but the proper remedy would be an action of trespass, or (as Lord *Coke* seems also to intimate) a special action on the case.<sup>4</sup> So, since the Statute of Wills,<sup>5</sup> a devisee of money to be paid out of lands may maintain an action upon the Statute for the money against the terretenant; and the proper action, according to the analogy of the common law, is debt.<sup>6</sup> So upon the Statute of Hue and cry,<sup>7</sup> which makes the hundred "answerable for the robberies done and the damages," an action on the case, and not an action of debt, lies for the party grieved; for the cause sounds properly in dama-

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<sup>1</sup> Com. Dig. *Action on Statute*, (A, 1.)

<sup>2</sup> 9 H. 3, 29.      <sup>3</sup> 2 Inst. 55.      <sup>4</sup> Ibid.      <sup>5</sup> 32 Hen. 8, ch. 1.

<sup>6</sup> Com. Dig. *Action on Statute*, (A, 2.)      <sup>7</sup> 6 Mod. R. 27.

<sup>7</sup> 13 Edw. 1, St. 2, ch. 1 and 2.



ges.<sup>1</sup> And the same rule applies to other Statutes, where the compensation depends on unliquidated damages.<sup>2</sup> On the other hand, on the Statute of 2 Edw. 6, ch. 13, which gives a forfeiture of the treble value for not duly setting forth tithes, debt has been held to lie.<sup>3</sup> Lord *Holt* is reported to have said, that the case of debt upon this Statute was at first a strain, because it gave an action of debt, whereas the Statute gave treble damages; but the party should rather have had an action on the Statute.<sup>4</sup> His Lordship, however, was clearly mistaken; for \*the words \*292 of the Statute give the treble value, and not treble damages; and debt lies in every case of a penalty, where the sum is certain, or can be readily reduced to a certainty, as the treble value may. But the very distinction alluded to by his Lordship clearly shows, that though debt is in general the remedy for penalties and forfeitures on Statutes; yet that it is not universally so. For the remedy follows the nature of the case, and debt lies only when, by analogy to the rules of the common law, the duty or penalty lies not in unliquidated damages, but is capable of being reduced to a certainty. So, if the forfeiture be of a chattel, detainue, and not debt, is the proper remedy. And cases may arise under a Statute, in which the parties may have divers remedies. For instance, by the Statutes of New Hampshire and Massachusetts, towns are obliged to support paupers having settlements therein; and are compellable, in certain cases, to pay the expenses incurred by other towns on account of such paupers. Actions of assumpsit upon these Statutes are very frequent; and (assuming that corporations have a capacity to make a promise) there cannot be a doubt, that the action well lies; for the Statutes create

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<sup>1</sup> *Ratcliffe v. Eden*, Cowp. R. 485. *Allen v. Hundred of Kirkton*, 3 Willson R. 318. 1 Chitty Plead. 143, 144.

<sup>2</sup> *Pinkney v. East Hundred of Rutland*, 2. Saund. R. 374.

<sup>3</sup> 2 Inst. 648-650. 1 Roll. Abr. 598, l. 25. Com. Dig. *Debt*, (A, 1.)

<sup>4</sup> *College of Physicians v. Salmon*, 1 Ld. Raymond R. 680.

a direct and immediate liability *quasi ex contractu*. But there can be as little doubt, that an action of debt will lie in the same case, as the claim is for a determinate sum of money, arising from a legal and direct duty, if the Statute do not point to any other form of action.

The result of this examination instructs us, that the action to be pursued to enforce a statutable right, obligation, or remedy for a grievance, is not necessarily debt, but depends upon the subject matter and nature of the provisions of the Statute; and that it is not sufficient, in the present case, for the defendant to establish affirmatively, that an action of assumpsit or case might well lie; but negatively, that an action of debt will not.

\*293 \* The principal ground, upon which it is argued, that debt will not lie in this case, is, that this is a collateral liability, created by Statute; and that, by analogy to the rule of law, that debt will not lie on any collateral undertaking by contract, it will not lie in this case, which is *quasi ex contractu*. By the ancient Common Law, all matters of personal contract were considered as binding only in the light of debts; and the only means of recovery in a Court was by an action of debt.<sup>1</sup> And the legal notion of a debt was, a duty, created by the Common Law upon some good consideration, moving immediately between and for the benefit of both parties; such as upon a borrowing, a sale, a lending, a hiring, or a deposit.<sup>2</sup> In short, contracts of debt were (as Lord C. J. *Vaughan* declares) deemed reciprocal grants.<sup>3</sup> A promise, therefore, to pay money, founded merely on a consideration affecting third persons, or to the prejudice or injury of the promisee, without any benefit to the promisor, was deemed a mere *nude pact*, and not sufficient to raise a valid contract of

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<sup>1</sup> 1 Reeves Hist. 159. Glanville, Lib. 10, ch. 1, 2, 3, &c.

<sup>2</sup> Glanville, Lib. 10, ch. 3.

<sup>3</sup> *Edgecomb v. Dee*, Vaughan R. 89, 101.

debt. And, therefore, if a person, for a good consideration, promised to pay the debt of another, either generally, or at a future day, it was held a mere collateral engagement, for which an action of debt did not lie; though it would have been otherwise, if the promise had been by deed. One of the earliest cases on this subject is in 44 Edw. 3. 21.† There, in the writ of debt, the plaintiff declared, that a man had borrowed of him one hundred shillings to be paid at a certain day, at which day he did not pay it; upon which the defendant came, and requested the plaintiff to take him as his debtor, and to delay asking payment until St. Michaels next following, and he \* would then pay, \*294 and so became principal debtor. And because the plaintiff could not show any specialty, proving this thing, it was adjudged, that he should take nothing; for *Moubrey J.* said, according to his understanding, the person was not discharged; and so the defendant could not be debtor, if the other remained chargeable. There was another case in 9 Hen. 5. 14, which was debt upon a promise by A to pay a judgment recovered by the plaintiff against B, if the plaintiff would release B from the execution. The plaintiff did release B, and afterwards brought this action; and an exception being taken, *Cockrain J.* said, that the matter, in his opinion, was not sufficient to maintain the action; and the report then proceeds, “*quere, ex nudo pacto non oritur actio, etc. issint est l’opinion, etc.*”; from which it is inferred, that in the opinion of the Court the action did not lie.<sup>1</sup> However, the doctrine does not seem to have been completely settled; for in several subsequent cases, the point was incidentally discussed and disputed;<sup>2</sup> and in 27 Hen. 8. 24, the Court was divided in

† See this same point made 18 Edw. 3. 13, and 1 Roll. Abridg. 593, C, 30.

<sup>1</sup> Com. Dig., *Debt*, (B).

<sup>2</sup> 37 Hen. 6. 8. 14 Edw. 4. 7, 6. 15 Edw. 4. 32. 17 Edw. 4. 4 and 5.

opinion upon it. That case was assumpsit, brought on a promise made by the defendant to pay a debt of A for which he was in prison on execution, if the plaintiff would release A from the execution; and the plaintiff averred, that he did release him. It was among other things argued, that case d'd not lie; for that debt was the proper remedy. But the whole Court said, it was not so; for in many cases a man may have an action on the case, where he has another remedy; and *Spelman* and *Port* Justices, held, that debt would lie as well as case; but *Brooke J.* and *Fitz James C. J.* were of a different opinion, and said, that debt would lie only, where there is a contract; for the defendant had not a *quid pro quo*; but the action is founded solely on the as-  
 \*295 sumption, \* which sounds merely in covenant; and as there was no specialty, the plaintiff had no other remedy, but an action upon the case. Since that time, there is a string of cases on each side of the question; some of the authorities asserting, that debt will lie upon a collateral contract for the payment of money; and others expressly denying it. The weight of authorities certainly is against the action.<sup>1</sup> The earlier cases manifestly proceeded upon the notion, that there was a want of sufficient consideration, or, as it is quaintly expressed, that there was no *quid pro quo*, on which to found a contract. And when this doctrine was exploded, as it could not fail to be, by the good sense of succeeding times,<sup>2</sup> it was held, that the effect of the

<sup>1</sup> *Johnson v. Morgan*, Cro. Eliz. R. 758. *Bloome v. Wilson*, T. Jones R. 184. *Sands v. Trevilian*, Cro. Car. R. 193. *Dyer*, 272, in margin. Com. Dig., *Debt*, (A 8). 1 Roll. Abr. 593, E 45, E 51. Id. 594, line 10. Doct. and Student, Dial. 2, ch. 24. *Core's case*, 28 H. 8. *Dyer* R. 19, 21, per *Luke J.* *Anon.* 1 Vent. R. 293. *Kent v. Derby*, 1 Vent. R. 311. *Rover v. Rover*, 2 Vent. R. 36. *Anon.* 1 Vent. R. 268. *Stonehouse v. Bodville*, T. Raymond R. 67. *Masters v. Mariot*, 3 Lev. R. 363. *Anon.* Hard. R. 485. Gilb. R., *Debt*, p. 364. *Bishop v. Young*, 2 Bos. & Pul. R. 78.

<sup>2</sup> Doct. and Student, Dial. 2, ch. 24.

promise was not to create a debt or duty to pay the specific sum agreed to be paid, but only such damages as the plaintiff had sustained by the breach of the contract; and that, therefore, an action upon the case, and not debt, was the proper remedy.<sup>1</sup> Lord *Loughborough* instructs us, that the manner in which the action of assumpsit was brought, prior to *Slade's case*, was by stating, not a general indebitatus assumpsit, for it was not brought merely on a promise, but a special damage for a non-feasance, by which a special action on the case arose to the plaintiff; and that *Slade's case*<sup>2</sup> was the first, where general damages for the non-performance of a contract, were laid as the cause of action.<sup>3</sup>

\* That the real reason, why debt was held not to lie upon a \*296 contract to pay the debt of another, was the uncertainty of the sum to be recovered for the breach thereof, sounding merely in damages, and not any peculiar notion derived from its being a collateral undertaking, cannot be doubted. If such collateral undertaking to pay a sum certain be evidenced by a sealed instrument, there can be no doubt, that an action of debt well lies. And why? Clearly because it is a contract, upon which, by law, the party is entitled to recover a sum certain. Lord Chief Baron *Comyn* lays it down as a general proposition, that "debt lies upon every express contract to pay a sum certain."<sup>4</sup> Mr. Justice *Blackstone* asserts the same doctrine in still more precise terms. "Any contract, (says he,) whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt."<sup>5</sup> The true test is, therefore, whether the sum to be recovered has, upon the contract itself, a legal certainty. Following, therefore, the principle of the old decisions, we may well hold, that debt does not lie upon any collateral undertaking, where the sum to be re-

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<sup>1</sup> *Hardres*, 486. *Vaughan R.* 101.

<sup>2</sup> 4 Co. 42.

<sup>3</sup> *Rudder v. Price*, 1 H. Bl. R. 547.

<sup>4</sup> *Com. Dig., Debt*, (A, 8).

<sup>5</sup> 2 Bl. Com. 464.

covered is uncertain, and sounds merely in damages. But whenever the law, upon any undertaking, whether direct or collateral, gives the party a title to a determinate sum, which becomes his absolute due by the rules applied to the contract, it should seem, that an action of debt must, upon admitted principles, be held to lie. Indeed, an action of debt against a pledge or collateral security, *eo nomine*, is as old as the Common Law itself; and *Glanville* gives the form of the writ against them.<sup>1</sup>

It was, to be sure, necessary, that the engagement should be \*297 under seal, or be binding by custom for a sum \*certain (though *Fitzherbert* seemed to think otherwise;) <sup>2</sup> yet this was because, by the law of the land, the engagement was otherwise not binding, but was void as a *nude pact*. It does not seem to me an over-straining of the old doctrine, to apply it to any cases of collateral undertakings, in respect to which the law now pronounces, that the parties to the contract are bound to pay, not unliquidated damages, but a sum certain. For instance, the engagement of an endorser of a bill or note is merely collateral; yet, upon the default of the maker or acceptor, he is clearly liable by law to pay to the holder a determinate sum, the very sum stated in the bill or note. It is a duty, created by the custom of merchants, which is a part of the law of the land.<sup>3</sup> It would be a violation of the first principles of law, for the Court to direct, or the jury to give, a less sum to the holder. How then it can be correctly held, that debt does not lie by the holder against the endorser in such a case, I profess myself unable to comprehend. I must say with Lord *Loughborough*,<sup>4</sup> that "I cannot devise a substantial reason, why a promise to pay money not performed does not become a debt; and why it should not

<sup>1</sup> *Glanville*, Lib. 10, ch. 3, 4.

<sup>2</sup> F. N. B. 122, K. 137; but see 43 Edw. 3. 11.

<sup>3</sup> See *Eyre J. C.* in *Gibson v. Minet*, 1 H. Black. R. 602.

<sup>4</sup> *Rudder v. Price*, 1 H. Black. R. 555.

be recoverable, *eo nomine*, as a debt." If, however, "the authorities are too strong to be resisted," it will become our duty to bow to them, however unsatisfactory they may be. But when we find, that this doctrine rests mainly on a case in *Hardres*,<sup>1</sup> which was decided at a time, when the law relative to negotiable instruments was very little understood, and which has been recently overturned by an unanimous decision of the Supreme Court;<sup>2</sup> and when it has \*been decided, that an action of debt \*298 lies by the payee of a bill of exchange against the drawer,<sup>3</sup> whose engagement is certainly collateral, I own, that I am not without hope, that the law will, on this subject, be followed out upon its genuine and rational principles. If, therefore, the present case were to be considered exactly like the case of an endorser of a note, I am not quite prepared to admit, that an action of debt could not be sustained.

But we may well leave that point to be decided, when it shall arise; for this is not the case of a collateral contract, created by an endorsement. It may have some analogy to it, and so it has to an absolute guaranty or suretiship. This is a liability created, not merely by the act of the parties, but by the express terms of a Statute. The act of incorporation<sup>4</sup> provides, "that if said corporation shall, at any time hereafter, divide their stock, previous to the payment of all their bills, or shall refuse or neglect to pay any of their bills, when presented for payment in the usual manner, the original stockholders, their successors, and assigns, and the members of such corporation, shall, in their private capacities, be jointly and severally liable to the holder of any bill or bills, issued by the said corporation for the payment thereof," &c. &c. I agree at once to the position, that the bills of the

<sup>1</sup> *Anon.*, Hard. 485.

<sup>2</sup> *Roborg v. Peyton*, 2 Wheat. R. 385.

<sup>3</sup> *Hard's case*, Salk. R. 23. *Hodges v. Stewart*, Skinner R. 346.

<sup>4</sup> Act of 18th June, 1806.

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bank are to be considered originally as the debts of the corporation, and not of the corporators; and, except from some special provision by Statute, the latter cannot be made answerable for the acts or debts of the former. They are altogether in law distinct persons, and capable of contracting with each other. But the corporators are not strangers to the corporation. On the contrary, the law contemplates a privity between them; and upon \*299 that privity has created \*an obligation on the corporators, under certain circumstances, to pay the debts of the corporation. Nothing can be better settled, than that an action of debt lies for a duty, created by the common law, or by custom.<sup>1</sup> *A fortiori* it must lie, where the duty is created by Statute. Mr. Justice *Blackstone* says, "that every person is bound, and hath virtually agreed to pay such particular sums of money, as are charged on him by the sentence, or assessed by the interpretation of the law. Whatever, therefore, the law orders any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." Without placing any reliance upon this refined notion of contracts, it cannot be doubted, that the learned judge has expressed the true doctrine of the law. Whatever is enjoined by a Statute to be done, creates a duty on the party, which he is bound to perform. The whole theory and practice of political and civil obligations rest upon this principle. When, therefore, a Statute declares, that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration may be collateral or not; but it is not a subject matter of inquiry. And to deny, that it is a duty on the stockholder to pay the money, is to deny the authority of the Statute itself; for a duty is nothing more than a civil obligation to perform that, which the law enjoins. Here, then, the law has

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<sup>1</sup> *Anon.*, Hard. R. 485.



declared, that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty so to do. How then can the Court say, that debt does not lie, since there is a duty on the defendant to pay the plaintiff a determinate sum of money? There is no room, under this view of the case, for entertaining any question as to collateral undertakings. \* The law has \*300 created a direct liability, a liability as direct and cogent, as though the party had bound himself under seal to pay the amount; in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty. Indeed, if debt would not lie in this case, it is inconceivable, how assumpsit could. There is no pretence of any express promise; and if a promise is to be implied, it must be because there exists a legal liability, independent of any promise sufficient to sustain one. Now, the very action of a collateral undertaking is, that there exists no legal liability, independent of the promise to create a duty. And if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action of debt. Upon the most mature reflection, I am of opinion, that an action of debt well lies in this case.

There is another point, stated by the ingenious counsel for the defendant, which deserves particular notice. It is, that upon the true construction of this Statute, the right of action accrues only upon a division of the stock, and a subsequent refusal of the bank to pay its bills. And in support of this position, various cases have been cited, in which "or" has been construed "and". Those cases are good law; but they do not apply to the present case. The construction of this Statute, if not perfectly free from every subtle doubt, is reasonably certain. It gives a remedy against the stockholders in every case, where the bank neglects or refuses to pay its bills, upon presentment for payment in the usual manner, as well before as after a division of the stock. The intent of the Legislature must be very clear, and the mis-

chiefs very great, that would authorize a Court, in a case like the present, to substitute "and" for "or". What is there unreasonable in the Legislature's protecting the holder of a bank \*301 note against the \*insolvency of a bank, arising from other causes, as well as from a division of its stock.

The public mischief is no greater in the one instance, than in the other ; and the event of an insolvency from other causes is quite as much within the compass of probability, as from a division of the stock.

The District Judge concurs in this opinion ; and therefore judgment upon the demurrer must pass for the plaintiff.

## CIRCUIT COURT OF THE UNITED STATES.

### Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1817, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
Hon. JOHN DAVIS, District Judge.

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#### JOHN BEDFORD v. WILLIAM HUNT AND OTHERS.

By useful invention in the Patent Act of the United States, is meant, an invention, which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the moral health or good order of society.

It is of no consequence, whether its utility be general or limited to a few cases; and it is not necessary to establish, that the invention is of such general utility, as to supersede all other inventions now in practice to accomplish the same purpose.

The first inventor, who has put the invention in practice, and he only, is entitled to a patent. Every subsequent patentee, although an original inventor, may be defeated of his patent right, upon proof of such prior invention put in actual use. The law in such case adopts the rule, *qui prior est in tempore, potior est in jure*. In order to defeat a subsequent patent, it is not necessary to prove, that the invention has been previously in general use, and generally known. It is sufficient, if the same invention has been previously known and put in actual use, however limited the use, or the knowledge of the invention, might have been.

THIS was an action on the case for the infringement of a patent right. Bedford, in the year 1806, obtained a patent for a new and useful improvement in the making of boots, bootees, and shoes. He afterwards sold out to different individuals the right to use this patent in particular towns. The real plaintiff in this

case was William Chadwick, to \* whom such a right had been sold by Bedford ; and within whose limits the defendant had manufactured boots, &c. after the manner described in the patent, and vended the same, without having purchased, either of the plaintiff or of Chadwick, the right so to do. The general issue was pleaded, and under it the defendant endeavoured to prove, that the improvement, for which the patent was obtained, was not new ; and produced evidence to show, that shoes of the same description had been made many years before.

It was also contended, that the invention was not useful ; but upon experience had been found not to answer the purpose expected, and that this mode of making boots and shoes had been of late much laid aside.

The case was argued by *Webster* and *Thurston* for the plaintiff, and by *Blake* and *Orne* for the defendants.

In the course of the argument, the following questions of law were made to the Court. 1st. What degree of usefulness in an invention or improvement the law required, in order to support a patent ? 2dly. Into how general use, a prior inventor must have introduced an invention or improvement, in order to render void the privileges of a subsequent patentee ? On these points the jury were instructed, in the charge, as follows :

STORY J. (after stating the facts.) No person is entitled to a patent under the Act of Congress, unless he has invented some new and useful art, machine, manufacture, or composition of matter, not known or used before.

By useful invention, in the Statute, is meant such a one as may be applied to some beneficial use in society, in contradistinction to an invention, which is injurious to the morals, the health, or the good order of society. It is not necessary to establish, that the invention is of such general utility, as to supersede all other inventions now in practice to accomplish the same pur-

pose. It is sufficient, that it \*has no obnoxious or mischievous tendency, that it may be applied to practical uses, and that so far as it is applied, it is salutary. If its practical utility be very limited, it will follow, that it will be of little or no profit to the inventor; and if it be trifling, it will sink into utter neglect. The law, however, does not look to the degree of utility; it simply requires, that it shall be capable of use, and that the use is such as sound morals and policy do not discountenance or prohibit. In the present case there cannot be the slightest doubt, upon the evidence, that the patent is for a useful invention, in a very large sense.

It is not sufficient, however, that the invention is useful; it must also be new. The Statute declares it a good defence to an action for the infringement of the patent right, that the thing secured by the patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee. The first inventor, who has put the invention in practice, and he only, is entitled to a patent. Every subsequent patentee, although an original inventor, may be defeated of his patent right upon proof of such prior invention being put into use. The law in such case cannot give the whole patent right to each inventor, even if each be equally entitled to the merit of being an original and independent inventor; and it therefore adopts the maxim, *qui prior est in tempore, potior est in jure*. And to the present defendant it is perfectly indifferent, whether the first inventor has taken out a patent, or has dedicated the invention to the public, or not; for he may stand upon the defence, that the plaintiff is not the first inventor, who put the invention in use.

It has been argued by the plaintiff, that the defence set up by the Statute does not apply, except in cases, where the invention, or (as the Statute expresses it) the thing originally discovered, has been before generally known and in general use, among

persons engaged in the art or profession, \* to which it properly belongs. But I do not so understand the language of the Statute. To entitle a person to a patent as a first inventor, it is certainly not necessary for him to establish, that he has put his invention into general use, or that he has made it generally known to artisans engaged in the same business. And yet, upon the argument we are considering, unless it were so generally known and in use, he would be defeated by a patentee, who was a subsequent independent inventor.

The intent of the Statute was to guard against defeating patents by the setting up of a prior invention, which had never been reduced to practice. If it were the mere speculation of a philosopher or a mechanician, which had never been tried by the test of experience, and never put into actual operation by him, the law would not deprive a subsequent inventor, who had employed his labor and his talents in putting it into practice, of the reward due to his ingenuity and enterprise. But if the first inventor reduced his theory to practice, and put his machine or other invention into use, the law never could intend, that the greater or less use, in which it might be, or the more or less widely the knowledge of its existence might circulate, should constitute the criterion, by which to decide upon the validity of any subsequent patent for the same invention. I hold it, therefore, to be the true interpretation of this part of the Statute, that any patent may be defeated by showing, that the thing secured by the patent, had been discovered and put in actual use prior to the discovery of the patentee, however limited the use or the knowledge of the prior discovery might have been. And in the present case, I have little difficulty in holding, that the prior use is sufficiently established, if the testimony is believed; and that the only point of doubt is, as to the identity or diversity of the inventions.

*Verdict for the defendants.*

## \* ASAHEL WESTON v. JAMES PENNIMAN.

The ship registry Acts of the United States have not changed the common law as to the mode, in which ships may be transferred; but only take from any ship not transferred according to those Acts the character of an American ship.

By the general maritime law, a transfer of a ship should be evidenced by a bill of sale.

The legal title in a registered ship, may, consistently with the Acts, exist in one person, and the equitable title in another; and the disclosure of such equitable title is not required by the Acts, unless one party be an alien.

If a draft not negotiable, be accepted by the drawee, with an agreement to pay the amount to any person to whom it is assigned; the assignee after notice, may maintain an action for money had and received to his use against the acceptor.

**ASSUMPSIT.** 1st. For money had and received. 2dly. On an order dated on the 8th of September, 1814; drawn by Silas Penniman, payable to Amos Penniman, or order, and accepted by the defendant on the 8th day of September, 1815, and endorsed to the plaintiff. Plea the general issue.

The order produced on the trial, was as follows :

*Boston, September 8th, 1814.*

**MR. JAMES PENNIMAN,**

Sir, — Please to pay Amos Penniman, or order, all the net proceeds, which you may realize on a certain note of hand, signed by me, of this date, payable to you, for five thousand five hundred dollars, and secured by mortgage on real estate in Newbury Street. Also all the net proceeds, which you may realize on a certain note of hand signed by me, of this date, payable to you, for six thousand five hundred dollars, and secured by mortgage on real estate in Broad Street.

**SILAS PENNIMAN.**

\* *Boston, September 8th, 1815.* Accepted, to pay the proceeds \*307 of the above, after deducting all expenses, and what may be due to James Penniman and Co.

**JAMES PENNIMAN.**

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Weston v. Penniman.

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It was admitted, that the defendant had received on the account of Silas Penniman, as the proceeds of the property mentioned in the order, the sum of \$2639·60. But he claimed a right to appropriate the whole proceeds, in discharge of certain demands due to him from the said Silas. These demands were as follows. On the 17th of June, 1815, the defendant had contracted for the purchase of a ship, and the said Silas agreed to become interested in a moiety of her ; and until he should make due payment for his share, it was agreed, that the plaintiff should hold the ship in his own name. The agreement or contract of the parties was evidenced in the following writing :

*Boston, June 17th, 1815.*

**MESSEES. JAMES PENNIMAN AND Co.**

Gentlemen, — I hand you twelve hundred dollars, and authorize you to invest it in a new ship on North River, built by Mr. Sampson, near the bridge on said river. And you are authorized to purchase one half said ship at twenty-three dollars per ton, for me, and on my account ; and fit her for sea, to sail in your names, for your security for the future payments, until my payments to you are completed for said half. And I authorize you to make insurance, and employ her in freighting, as you shall judge best. And in case I fail to make the future payments, in due season for you to meet your payments for the said ship, I authorize you to sell her on my account for the payment of the same.

**SILAS PENNIMAN.**

- \*308 \*It was in evidence, that the sum of \$ 1200 referred to in the above letter was again drawn out of the hands of James Penniman and Co. by a draft of the said Silas Penniman upon them for that amount.

On the 20th of July, 1815, the defendant took out a register for the ship, in his own name, as sole owner ; and continued to



employ her in his own name, until October, 1816, when she was sold at a considerable loss. The defendant's demands were for expenses and disbursements beyond the earnings of the ship ; and for a moiety of the purchase-money, after deducting therefrom a moiety of the proceeds of the sale ; which demands, if admissible in point of law, and duly proved in point of fact, were sufficient to absorb all the money received by the defendant.

*Webster* and *Peabody*, for the defendants, contended, that the laws of the United States did not prevent the assertion of an equitable interest in American ships, notwithstanding the registry was in the name of others, if those setting up this equitable interest, or in whom it was alleged to exist, were American citizens. The object of the law was to prevent the privileges of American ships from being enjoyed by foreigners ; and it had been accordingly decided, that no foreigner could set up an equitable interest in such ship, because that would be permitting the end of the law to be entirely defeated.<sup>1</sup> But American citizens, although not named in the registry, might have an interest in American vessels, which they could assert against those, who are named in it. As between the parties themselves, equitable rights and interests might be regarded, without any infringement upon the law. The defendant, it is true, has sworn, on obtaining the registry, that he was the sole owner. But this means no more than that he was the sole legal \* owner. The law requires him to aver, in \*309 explicit terms, that " there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of confidence, trust, or otherwise, interested in such ship or vessel, or in the profits or issues thereof." <sup>2</sup> But it does not require him to deny, in like manner, that any citizen of the United States is interested in the

<sup>1</sup> *Maybin v. Coulon*, 4 Dallas R. 298. *Duncanson v. M'Lure*, 4 Dallas R. 308. *Idem*, 342.

<sup>2</sup> U. S. Laws, N. Ed. ch. 148, § 4.

vessel, 'by way of trust or confidence. If the bare declaration, that he was sole owner, had been understood to negative the existence of any sort of interest in any other persons, this subsequent provision would have been unnecessary. But the Act requires an express denial of any trust for the benefit of foreigners. By making this provision for the case of foreigners, the legislature has put a construction on the former part of the oath; and by confining it to the case of foreigners, it has permitted the existence of equitable interests in American ships, in American citizens.

There is an essential difference between the law of the United States and the British Registry Act, in relation to this question. The British Statute requires the person applying for registry, not only to make oath, that he is the sole owner, but also that "no other person or persons whatever, hath or have any right, title, interest, share, or property therein, or thereto."<sup>1</sup> This latter provision seems to have been purposely omitted by those, who framed the Act of Congress, and who incorporated into it the principal provisions of the British Act.

The British Statute also provides, that the sale of a registered ship can only be made by a bill of sale, which shall truly and accurately recite the certificate of registry; and declares that, any bill of sale, without such recital, "shall be utterly null and void, to all intents and purposes." But the Act of Congress \*310 contains no such provision. An \*American ship may be legally transferred by any proper written instrument, although it does not recite the registry. The property will pass. But the difference is, that although the purchaser becomes owner of the ship, she is not, in his hands, entitled to a new registry, nor to the privileges of an American vessel. These can be obtained only

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<sup>1</sup> 26 George 3. cap. 60, sec. 10.

by taking a bill of sale, in which the certificate of registry is recited at length.<sup>1</sup>

The learned author of the treatise on ships and seamen, refers to the American Registry Act, which, he says, contains provisions, corresponding in the greater part, with those of the Statute of 26 Geo. III. ; but he does not notice the differences between the two Acts in relation to the question arising in this case.<sup>2</sup> His American annotator takes notice of this difference.<sup>3</sup> Following the express and unequivocal declaration of the Act of Parliament, the English Courts have holden, that no equitable interests, even in British subjects, can be alleged, in contradiction to the statement contained in the register.<sup>4</sup> This provision seems to have been a favorite object with Parliament, for in consequence of some doubts said to have been expressed in regard to the case of *Hibbert v. Rolleston*,<sup>5</sup> the Act of 34 Geo. III. cap. 68, was passed, re-enacting the provision of the former Act, in the strongest and most comprehensive forms of expression.<sup>6</sup> The Congress of the United States appears to have entertained no such purpose. They have made no such \* provision. On the contrary, \*311 it is the necessary inference from the whole Act, that they intentionally departed, in this respect, from the English Statute, which was their general model ; and, having provided against equitable interests in foreigners, left such interests nevertheless to be asserted, as in other cases, by American citizens. A ship, entitled to

<sup>1</sup> Laws of the U. S. new Ed. vol. 2, p. 321. Act concerning registry of vessels, 814.

<sup>2</sup> Abbott on Shipping, 4th London Edit. p. 28.

<sup>3</sup> American Edit. 58.

<sup>4</sup> *Camden v. Anderson*, 5 Term Rep. R. 709. *Curtis v. Perry*, 6 Vesey, jr. R. 739. *Ex parte Yallop*, 15 Vesey, jr. R. 60. *Ex parte Houghton*, 17 Vesey, jr. R. 251.

<sup>5</sup> 3 Brown's C. C. R. 571.

<sup>6</sup> *Curtis v. Perry*, *ut supra*. Abbott, 542.

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the privileges of an American vessel, cannot be legally owned by a foreigner; nor can a foreigner claim any right or interest therein, in law or equity. But such ship may be owned by an American citizen. And she may be owned by one American citizen in trust for another; because other chattels may be so owned, and because such trust is not prohibited by the provisions, nor in opposition to the policy of the law. If the purchase in this case had been profitable, Silas Penniman might have compelled the defendant to permit him to partake in the profits; and as there was a loss, it is competent for the defendant to call on the said Silas Penniman to bear that portion of the loss, which he ought to bear, according to his agreement.

But there is another ground, on which the evidence is admissible. The agreement in this case was executory. It was not a purchase, but an agreement to purchase; and no case is produced, in which it has been decided under the English Act of 20 Geo. III., that an agreement to sell was void, unless such agreement recited the registry. On the contrary, in *Addis v. Baker and others*,<sup>1</sup> *McDonald*, Chief Baron, says, "The question, whether the Statute 26 Geo. III. attaches on an agreement for the sale of a ship, as well as on the actual sale, is very important. I am not at present prepared to say, that it does extend so far." It does not appear from the report, whether a final decision of the question was made in that case. Shortly after this opinion was intimated, by the Court of Exchequer, the

\*312 \* Statute of 34 Geo. III. cap. 68, was passed, which provides, in explicit terms, that no transfer, contract, or agreement for transfer of property, in any ship or vessel, shall be valid or effectual for any purpose whatsoever, either in law or equity, unless such transfer, or contract, or agreement for transfer, shall be made by bill of sale or instrument in writing, containing a recital of the

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<sup>1</sup> Anstruther R. 223.

certificate of registry. This Act left no room for further question in the English Courts. But if the question had rested solely on the 26 Geo. III., it is probable from the case of *Addis v. Baker* that it would have been decided, that an agreement to sell was not within the provisions of that Act. As before observed, the laws of the United States contain no provision similar to those in this Act of the British Parliament.

There is nothing in the oath, taken by the defendant at the Custom House, at all inconsistent with the present defence. He made oath, that he was the sole owner. Upon the supposition, that this was a denial of all sorts of interest in any body else, by way of trust or otherwise, which is not admitted, still the averment would be true. Silas Penniman at that time did not own any part of the vessel. He had agreed to buy one half; but it still rested in contract. He afterwards refused to take and pay for, that half; and this breach of contract forms the ground of the defendant's complaint. If the defendant had sworn at the Custom House, that Silas Penniman owned one half of the ship, it would not have been correct. He did not own any part of it. But that does not prevent the defendant from charging him with one half the cost of the vessel, and one half the loss incurred on it; because such was the agreement of the party, and there is nothing in the oath taken by the defendant, either in any degree inconsistent with the facts of the case, or with his defence in this action. Silas Penniman, he says, agreed to become owner of one half of this ship, and to share, in that proportion, in the profits and \* losses which might arise from the purchase; and he \*313 insists that he has a right to enforce this agreement, and to retain out of this fund, a sum equal to what he has lost by Silas Penniman's failing to comply with his contract.

*Welsh*, for the plaintiff. All maritime nations have been extremely careful in enacting, from time to time, strict laws in rela-

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tion to the evidence of property in vessels; and all have excluded foreigners from any participation in the ownership or emoluments, derived from the employment of them. They have carried their jealousy on this subject so far as to require, that all, who are interested in ships or vessels, should appear so by the legal evidences of such property. It is evidently the policy of the State to prevent secret trusts or secret ownership, in regard to vessels. And so it was considered in England; for while the case of *Addis v. Baker and others*,<sup>1</sup> was under the advisement of the Court, the Parliament passed an Act, putting at rest the question, which was raised in the case, viz. whether the Statute of 20 Geo. III. extended to agreements to sell, as well as to actual sales. There is every reason to suppose, that if that Act had not passed, until after the decision in the case of *Addis v. Baker*, that that decision would have been in conformity with the spirit of it. The legislature of this country had a like opinion of the importance of this subject to the nation; and in the 4th section of the Act of 31st of December, 1792, we find it pointed out, in what manner a citizen of the United States, wishing to obtain a certificate of registry, must proceed; and what things must be done, before he shall become entitled to it. It is there declared, that a register shall be granted on condition, that the person applying for it shall, among other things, declare on

\*314 oath, "his or her name and place of \*abode, and if he or she be sole owners of the said ship or vessel, that such is the fact; or if there be another owner, or other owners, that there is, or are, such other owners, specifying his, her, or their name or names and place or places of abode; and that he, she, or they, as the case may be, so swearing or affirming, is or are citizens of the United States." There is no necessity for recurring to English authorities to ascertain the meaning of our own laws on

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<sup>1</sup> Anst. R. 223.

this subject. It has been argued in the argument, that our Statute does not contain a provision, which is found in the English Statute on the same subject ; and that the American Statute does not require, that all the owners of a registered vessel of the United States, should be mentioned in the bill of sale and register. It is true, that no positive provision, requiring the mention of all the owners' names in the register, is found in our laws ; but there are provisions, from which it must undeniably be inferred, that such was the intention of Congress. In the 4th section, which prescribes the form of the register, there are words, which evidently imply such an intention. It is there required, that, where there is more than one owner, the name or names of such other owners shall be inserted in the register. This requirement in the form of the register is as effectual, as if the Statute had declared, that the names of all the owners should be inserted in it. This cannot apply to foreign citizens ; they are by another section excluded from all participation in property in American vessels ; of course their " name or names " could not be here intended. The only way, in which this provision of the Statute can have effect, is by applying it to American citizens ; then to make an American citizen a legal owner, entitled to the privileges and subject to the liabilities of that character, his name should be inserted in the register. The defendant has sworn at the Custom House, that he was the sole owner, and Silas Penniman's name was not inserted in the ship's \*register ; he, there- \*315 fore, cannot be charged, as such, with his proportion of the sums lost in her voyages ; and they ought not to be deducted from the proceeds of the property, which the defendant has by the obligation declared or acknowledged, that he had received, and promised to account for.

Although there was an extensive authority given by Silas Penniman's letter of the 17th of June, 1815, to the defendant, to employ the ship in freighting, in any way he might judge best,

it certainly cannot be pretended, that there was to be no limitation to this authority ; and that all right to information, as to the success of the employment of the ship, was waived by Silas Penniman. If, after the first voyage, it appeared, that a loss had been incurred, and that there was no prospect of employing the ship profitably in future, why was he not advised of it. If he had been consulted, he might have thought it most prudent to put up with the first loss, dispose of the ship for the most she would produce, and thus end a ruinous concern. It would have been the grossest injustice to have told him, that, by his agreement to become interested in the ship, which was then building, he had entrusted the management of her to the defendant, and that he had no right to terminate his interests in her, although he was satisfied, that she could not be profitably employed in the manner contemplated by the agreement. If the agreement be only executory, and resting in contract, the claim for indemnification against Silas Penniman would not be for his proportion of the losses sustained in the use of the ship in freighting, but merely the difference between the amount of the payment necessary to the completion of this ship, and her real value when finished ; that is, if in consequence of any event, such as a depreciation in the value of vessels, she was worth less when finished, than it cost to build her ; because Silas Penniman

\*316 agrees to become interested in one half of \* the ship, and in case he should not make the necessary payments in due season, authorizes James Penniman to sell her, to reimburse the sums expended by him on account of the half, which the former engages to take. There was no demand made on him for his proportion of the costs, when she was finished, and entitled to a register, and no notice of an intention to sell until October, 1816, when it was ascertained, that it had been a losing concern. There is no evidence to show, that she was not worth at the time she went to sea, what it cost to build her. It was at this time, that



the right to sell vested by the agreement in the defendant, in case it appeared, that Silas Penniman was unable or unwilling to perform his engagement.

There is no equity in the defendant's claim, to set off one half of the loss incurred by him in the employment of his vessel, because he allowed Silas Penniman to draw on him for the sum of \$ 1200, shortly after the payment of that sum, on the 17th of June, 1815 ; and as there is no evidence of any other money transactions between them at that time, there is strong reason to suspect, that by accepting to pay that sum, it was understood, that the agreement to become concerned in the ship was waived by James Penniman.

STORY J., (after summing up the facts.) There are some questions of law in this cause, upon which it is my duty to give an explicit instruction. The first is, whether the legal title to a ship can, since the Registry Acts of the United States, be transferred, without complying with the forms prescribed in those Acts.<sup>1</sup> Upon this question the right of the defendant to set off or deduct his own demands for expenses and disbursements from the proceeds \* in his hands, materially depend. And I am of \*317 opinion, that the Registry Acts have not, in any degree, changed the Common Law as to the manner of transferring this species of property. To be sure, a bill of sale is necessary to pass the title of a ship. But this does not depend upon any enactment peculiar to our municipal law ; but it grows out of the general maritime law, which requires such a document as the proper muniment of the title of the ship.<sup>2</sup> To entitle ships to be registered, and to be deemed ships of the United States, with the privileges

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<sup>1</sup> Acts of 31st of December, 1792, ch. 1, and of the 18th of February, 1793, ch. 8.

<sup>2</sup> *The Sisters*, 5 Rob. R. 138.

and exemptions of such ships, it is necessary, that the transfer should be made according to the form prescribed in the Registry Acts; that is to say, that it should be by some instrument in writing, which shall recite at length the certificate of registry; but the Acts do not declare any other transfer void and illegal; but simply deny to ships transferred in any other manner the privileges of ships of the United States, and deem them alien or foreign ships. In this respect our Acts differ from the English Registry Acts,<sup>1</sup> which declare, that all transfers, or agreements for transfers, made without reciting the certificate of registry at length in the bill or instrument of sale or agreement for transfer, shall be utterly void to all intents and purposes whatsoever.

In the next place it is contended, that the defendant cannot set up, in this case, any title to one moiety of the ship in Mr. Silas Penniman, and charge him with a moiety of the expenses, disbursements, and purchase-money, because the defendant had the ship registered in his own name as sole owner, and made oath to such sole ownership before the collector, and he is, therefore, estopped to set up a fraud upon the Registry Act, to sus-  
\*318 tain his claim. But it \* is to be considered, that the title set up in Mr. Silas Penniman is a merely equitable title; and the sole legal title was, by the agreement of the parties, to remain in the defendant. The oath required by the Registry Act of 1792, ch. 1, § 4, to be taken by the owner, respects only the legal ownership of the property; and does not require a disclosure of any equitable interests vested in the citizens of the United States; but only a denial, that any subject or citizen of any foreign prince or state, is directly or indirectly interested by way of trust, confidence, or otherwise in the ship, or in the profits or issues thereof. It is sufficient, that the legal interest is truly

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<sup>1</sup> 26 Geo. 3, ch. 60, § 17. 34 Geo. 3, ch. 68, § 14. Abbott on Shipp. Part 1, ch. 2, § 16.

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stated ; and if there be any equitable interest or trust in favor of any other citizen of the United States, no fraud is committed upon the law. Suppose a mortgage made of a registered ship, may not the mortgagee truly declare himself the legal owner, notwithstanding an equitable right of redemption in the mortgagor ? <sup>1</sup>

There is another point in this case, which has been urged by the defendant's counsel, viz. that the instrument sued on is not negotiable, and that, therefore, the plaintiff is not entitled to recover, even if the set-off or deductions claimed by the defendant cannot be sustained. It is certainly true, that the instrument is not negotiable, and therefore it cannot be declared on as such. But by his acceptance the defendant undertook to hold the proceeds, after deducting his own demands, for the account of such person as should, by the endorsement or order of Mr. Amos Penniman on the draft, entitle himself to the proceeds. The plaintiff is the regular endorsee or appointee of Mr. Amos Penniman ; and after notice of this fact, the defendant must be considered as holding the money for his use ; and under \* such \*319 circumstances the law will imply a promise to pay the same over to him. The money counts are therefore fully sustained, if the set-off does not absorb the whole proceeds. The cases of *Fenner v. Meares*,<sup>2</sup> and *Innes v. Dunlop*,<sup>3</sup> are strongly in point.

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<sup>1</sup> See as to equitable interests under the British Registry Act, *Addis v. Baker*, 1 Anst. R. 222. *Spelt v. Lechmore*, 13 Ves. R. 588. *Ex parte Houghton*, 17 Ves. R. 251. *Camden v. Anderson*, 5 T. R. 709.

<sup>2</sup> 2 W. Black. R. 1269.

<sup>3</sup> 8 T. R. 595.

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Meany v. Head.

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The case was shortly argued upon the motion for a new trial, by *Welsk* for the plaintiff, and by *Gorham* for the defendant.

STORY J. There is no pretence of a general property in Mr. C. W. Greene ; and the plea puts in issue, so far as respects the parties to this suit, the general property only in the goods replevied. Nor had Mr. Greene any special property in the goods ; for he had a lien only for the general balance of his account, as a factor ; and a lien, as has been well observed in *Brace v. Duchess of Marlborough*,<sup>1</sup> is neither a *jus ad rem*, nor a *jus in re*. The lien of a factor is a mere right of retaining the goods of his principal, until his demands in that capacity are settled ; and it gives the factor a rightful possession, which cannot be divested without his own consent. But as against his principal, it gives him no general or special property, whatever may be the case in respect to mere strangers.<sup>2</sup> And in the present case, Mr. Greene never authorized the defendant to as-  
 \*322 sert any claim for a lien on his account. On \*the contrary, Mr. Greene now expressly waives any claim for a lien on account of his general balance, and justifies the defendant in abandoning it ; and the defendant has been paid his own charges for storage. Under these circumstances a return irreplevisable could not, under any acknowledged form of pleading, be awarded by the Court.

It is as clear, that the lien of Mr. Greene is not an attachable interest under the trustee process served on the defendant, either as personal property, or as a chose in action, due from the defendant to Mr. Greene. The only doubt, that I have ever entertained, is, whether a writ of replevin was a proper remedy

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<sup>1</sup> 2 P. W. R. 491.

<sup>2</sup> *Hammonds v. Barclay*, Per Grose J., 2 East R. 235. *Lickbarrow v. Mason*, Per Buller J., 6 East R. 25, note. *Wilson v. Balfour*, 2 Camp. B. 579.

in this case. At Common Law a writ of replevin never lies, unless there has been a tortious taking, either originally, or by construction of law, by some act, which makes the party a trespasser *ab initio*. In case of a bailment, or rightful possession of the property, replevin is certainly not the proper remedy at Common Law; but detinue or trover lies in such case, where there is an unjustifiable detention or conversion. This doctrine is very fully expounded and justified by Lord *Redesdale* in some recent cases;<sup>1</sup> and has been recognised by a very learned judgment in our country.<sup>2</sup> Nor has the Statute of replevin of Massachusetts<sup>3</sup> altered the Common Law in this respect. It gives the remedy only, when goods are taken, distrained, or attached, which are claimed by a third person, who thinks proper to replevy them. The Act requires, that there should be a wrongful taking, distress or attachment from the possession of another; for the count in the Statute, expressly alleges the goods to be taken unlawfully, and without justifiable cause.

\* Under the circumstances of this case, if the issue had been \*323 *non cepit*, it must have been found for the defendant; for he never took the goods in any legal sense from the possession of another. He received them on storage; and the delivery to him was a lawful delivery, upon a bailment for safe keeping. *Non cepit* puts in issue the fact of an actual taking; and unless there be a wrongful taking from the possession of another, it is not a taking within the issue. A wrongful detainer after a lawful taking is not equivalent to a wrongful original taking.

But if on *non cepit*, the issue would have been found for the defendant, no return could have been awarded to him. It would

<sup>1</sup> *Ex parte Chamberlain*, 1 Sch. and Lefr. 320. *Ex parte Wilson*, Ibid. 321, note. *Shannon v. Shannon*, Ibid. 324, 327. See also *Galloway v. Bird*, 4 Bing. R. 299.

<sup>2</sup> *Pangburn v. Patridge*, 7 Johns. R. 140.

<sup>3</sup> Act of the 25th of June, 1789, ch. 26, § 4.

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therefore after all be but a mere question as to costs ; and as the parties have agreed in no event to claim any costs, there is no reason for entertaining the motion for a new trial, since the merits are clearly against the defendant. The motion is overruled, and the judgment must pass for the plaintiff upon the verdict.<sup>1</sup>

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 ADRIAN CREMER

v.

STEPHEN HIGGINSON AND SAMUEL G. PERKINS.

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Upon a letter containing this clause, " the object of the present letter is to request you if convenient, to furnish them, (Messrs. Stephen and Henry Higginson,) with any sum they may want, as far as fifty thousand dollars ; say fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it ; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount." *Held*, that this was not an absolute original undertaking, but a guaranty ; that it covered advances only to Stephen and Henry Higginson, (who were then partners) on partnership account ; and could not be applied to cover advances to either of the partners separately, on his separate account ; that the authority of guaranty was revoked by a dissolution of the partnership, and no subsequent advances made by the party after a full notice of such dissolution were within the reach of the guaranty ; that the letter did not \* import to be a continuing guaranty for money advanced *toties quoties* from time to time, to the amount of fifty thousand dollars, but for a single advance of money to that amount ; and that when once advances were made to fifty thousand dollars, no subsequent advances were within the guaranty ; although at the time of such farther advances, the sum actually advanced had been reduced below fifty thousand dollars, by reimbursements of the debtors.

When a debtor owing several debts, makes a payment to a creditor, the debtor has a right to apply it to what debt he pleases ; if he makes no specific assignment, the creditor may apply it as he pleases ; and where neither party appropriates it the law will apply it according to its own notion of the intrinsic justice and equity of the case.

Where money is advanced to a partnership under a guaranty, and the partnership is dissolved, and the debt is then carried, at the request of the debtors, to their separate accounts, according to their proportion of interest in the partnership ; and the creditor gives the partners separately, a credit for such proportion, and discharges the partnership account, by carrying it to such separate account, and no

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<sup>1</sup> *President of Portland Bank v. Stubbs*, 6 Mass. R. 423.

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notice is given thereof to the guarantor, the latter is discharged from all responsibility.

If upon a letter of guaranty addressed to a particular person, advances are made upon the faith of the guaranty, it is the duty of the person so making the advances, to give notice thereof within a reasonable time to the guarantor, otherwise he will be discharged from all liability for such advances.

**T**HIS was an action of assumpsit, brought by the plaintiff as surviving partner of Thomas Theodore Cremer of Rotterdam, who had carried on business there, under the firm of Thomas and Adrian Cremer, against Stephen Higginson and Samuel G. Perkins, surviving partners of George Higginson of Boston, who had transacted business in Boston, under the firm of Stephen Higginson and Co. upon a letter of guaranty, bearing date December 15, 1808, and given by Stephen Higginson and Co. to Stephen Higginson, Jr. and Henry Higginson, merchants of Boston; and at that time partners, under the firm of Stephen and Henry Higginson, and addressed to Messrs. T. and A. Cremer. The letter was admitted by the defendants to have been written by Stephen Higginson and Co. and is as follows :

\* *Boston, December 15th, 1808.* \*325

**MESSRS. THOMAS AND ADRIAN CREMER,**  
**ROTTERDAM,**

Our friends and connexions, Messrs. Stephen and Henry Higginson, contemplate, under certain circumstances, making a considerable purchase of goods on the continent, and for that purpose are about to send an agent to Europe. They wished to obtain a letter of credit from us to increase their means, and to be used or not as circumstances may require. As we are now indebted to you, and have no funds on the continent of Europe, we told them we could not give a positive letter of credit for any sum, but that we had no doubt you would be disposed to furnish them with funds under our guarantee. The object of the present letter, is therefore to request you, if convenient, to furnish

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them with any sum they may want, as far as fifty thousand dollars ; say fifty thousand dollars. They will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it ; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount, and are, with great regard, gentlemen,

Your friends and servants,

STEPHEN HIGGINSON AND CO.

Signature of S. V. S. WILDER.

It was proved in the cause that Mr. S. V. S. Wilder, the agent referred to in said letter of guaranty, shortly after the date of it, went to Europe, having a general letter of credit from Stephen and Henry Higginson ; and on or about June 10, 1809, he forwarded the letter of guaranty to Messrs. T. and A. Cremer, who acknowledged the receipt of it, June 19, 1809, in letters \*326 written by them to \* Stephen Higginson and Co., Stephen and Henry Higginson, and to Mr. Wilder, in which they agreed to give to Stephen and Henry Higginson, the credit asked for under the guaranty. These letters were severally received by the respective parties, to whom they were addressed. The letter of guaranty was written during the existence of the embargo in the United States ; but before it was received by Messrs. Cremer, the embargo was removed, and the commercial intercourse with Europe was restored, and large shipments of colonial produce were made to Holland. Among others, there was a large shipment of ashes made by Stephen and Henry Higginson, to T. and A. Cremer, and received by them before any use was made of the letter of guaranty by Mr. Wilder. On April 1st, 1809, Stephen and Henry Higginson dissolved their copartnership, of the intention to do which, they had previously given public notice in the newspapers in Boston, as early as May 8th, 1809, and at



different times after that. After this period, on September 14, 1809, Mr. Wilder wrote from Paris to T. and A. Cremer, that he had caused insurance to be effected at Hamburg to the amount of 60,000 *l.* on goods ordered to be shipped from Tonningen for account of Stephen and Henry Higginson, and asks Messrs. T. and A. Cremer to inform him, whether it will be most for the interest of Stephen and Henry Higginson, that they, T. and A. Cremer, should remit to Hamburg; or that the agent there, Mr. Thornton, should draw on them. This letter is answered September 19th, and T. and A. Cremer agree to accept drafts drawn on them to the amount requested, and desire Mr. Wilder to specify the names of the persons, for whose use the money is to be paid. The receipt of this letter is acknowledged by Mr. Wilder, September 25, 1809, in a letter of that date to T. and A. Cremer, and after agreeing that Thornton had better draw on them, he writes thus, "that a part of the goods are consigned to \* Messrs. Higginson and Dodge, New York; and a part to \*327 Messrs. Stephen and Henry Higginson, Boston, but in consequence of the dissolution of partnership of those firms, on or after the 1st of September present, you will please to consider the advances for account of Stephen Higginson, jr., in whose name the business is hereafter to be conducted; and in charging him with these advances, you will of course pass to his credit, a sufficient amount of the proceeds from the sales of the ashes now at your disposition, for account of Messrs. Stephen and Henry Higginson, for your reimbursement." And on the 30th of the same month, before receiving an answer from T. and A. Cremer, he writes them again, saying he has authorized Messrs. Von der Leyen, of Crefeld, to draw on them for \$1307.15 for charges on goods forwarded to Tonningen, for account of Messrs. Stephen and Henry Higginson, and Higginson and Dodge; and he says, "which draft you will please to duly honor, and charge the amount to account of Mr. Stephen Higginson, jr. Boston,

whom I shall advise accordingly." On September 29th, T. and A. Cremer answered Wilder's letter of September 25th; and after observing that they do not know Higginson and Dodge, they request Mr. Wilder to write a letter saying, "that the insurance was for Stephen and Henry Higginson, and that you desire us to pay the same on their account by virtue of their letter of credit." This letter is answered by Wilder, October 14th, who says, "In conformity to your desire, when I receive Mr. Thornton's account, I will advise you to pay it for account of Messrs Stephen and Henry Higginson, by virtue of a letter of credit in my favor from Messrs. Stephen Higginson and Co., dated Boston, December 16, 1808;" and by virtue of the same credit, and for account of Stephen and Henry Higginson, he requests them to honor Von der Leyen's draft as per letter of advice

\*328 of 30th ult.; and these drafts Messrs. Cremer duly paid. \* On the 6th of September, 1809, Stephen Higginson, jr. wrote to Messrs. Cremer, informing them of the dissolution of his copartnership with his brother Henry, who had established himself in London, and requests them to advance Mr. Wilder funds on his account, and states, that he has shipped on board the *Golden Age*, 79 bbls. ashes consigned to the supercargo, and then says, "who is ordered to remit the proceeds to your orders for account of the late firm of Stephen and Henry Higginson, presuming that a balance may yet be due to you; if not, please to hold it to order of Henry Higginson, London." And on November 1st, 1809, Stephen Higginson, jr. writes again to T. and A. Cremer, and requests them to advance Mr. Wilder funds to the amount of \$100,000, and points out certain modes of reimbursement. Early in September, 1809, Henry Higginson established himself as a commission merchant in London, and T. and A. Cremer, in a letter to him, of October 4th, 1809, acknowledge the receipt of a letter from him of September 8, 1809; which letter they did not produce, in which they say, "We received your favor of

September 8th, and circular letter. We congratulate you on the new establishment, not doubting, but an entire success will attend it; to which we shall be happy to contribute as much as lies in our power." On the 16th of December, 1809, T. and A. Cremer acknowledge the receipt of Stephen Higginson, jr.'s letter of September 6th, and say, "we shall advance funds on your account to Mr. Wilder, when he requires it;" and then say they have already advanced him some sums; and also, "we accepted Mr. Wilder's draft for 6318·1 f. at thirty days' date on the 8th inst., for which we shall debit you on the 7th January next." On the 6th of January, 1810, T. and A. Cremer wrote to Henry Higginson, saying, they had received Stephen Higginson, jr.'s letter of November 1st, in which he requests the advance to Mr. Wilder of \$100,000; and \*they tell him they have no objection to \*329 grant it, not doubting that he will guaranty the same; and on the 8th January, 1810, they write Stephen Higginson, jr., acknowledging the receipt of his letter of November 1st; and say they have no objection to granting the credit, but as their object in making advances is to have shipments made them for the same; and as the bare interest is a poor compensation for advances made for an unlimited time, and as there is little probability, that he will be able to reimburse them by shipments, they must leave it to his equity to make them such a compensation as will be due them; and as Wilder then wanted the funds, they would go on to furnish them; and on the same day, they also wrote Stephen Higginson and Co. saying, "We had letters from Mr. Stephen Higginson, jr., requesting us to extend the credit to Mr. Wilder unto \$100,000. We have made no difficulty to grant this, not doubting but you will also approve of it, and warrant us the same, the credit opened by you in favor of Stephen and Henry Higginson, being only of \$50,000." This letter did not reach Messrs. Stephen Higginson and Co. until the month of June following, and was not answered by them. The letter of January 6, 1810,

to Henry Higginson not being answered, T. and A. Cremer wrote again to him on February 12, 1810, stating, that the credit was so large, which Stephen Higginson, jr. wished them to open with Mr. Wilder for his account, that they must insist on having his (Henry Higginson's) guaranty for the same; and on March 3, 1810, Henry Higginson in answer, agrees to become responsible to them. Previous to this period, on the 10th of October, 1809, Henry Higginson opened a credit with T. and A. Cremer, in favor of Mr. Wilder for 50,000 f., which was independent of the other credits. Between the 4th of October, 1809, and the 25th of August, 1810, Mr. Wilder drew, and authorized drafts to be  
\*330 drawn, on T. and A. Cremer for various sums of \* money, and T. and A. Cremer also, during that period, remitted to Mr. Wilder various bills of exchange; the whole of which sums so drawn and remitted, amounted to 242,092·7 f., equal to \$ 96,836·94; and prior to and during said period, T. and A. Cremer received remittances from Stephen Higginson, jr., to the amount of 152,927 f., equal to \$ 61,170·80, but no direction was specifically given by Stephen Higginson, jr. in what manner said remittances should be credited. Of the sums composing the 242,092·7 f., 67,175·13·8 f. in different sums, was stated in the correspondence to be advanced under the guaranty of Stephen Higginson and Co.; 44,361·14·8 f., in different sums, were stated to be under Henry Higginson's guaranty of 50,000 f. and 130,554·19 f., in different sums, was advanced without any guaranty being specified. Again, of this sum of 242,092·7 f. two sums advanced in October, 1809, amounting to 19,426·18 f., were stated to be for account of Stephen and Henry Higginson; 8,910·6 f. was advanced without any mention on whose account; and all the residue was specifically stated to be for account of Stephen Higginson, jr.

On an exhibit of sundry extracts from the books of T. and A. Cremer, it appeared also, that two entries, in the year 1809,

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were made to the debit of Stephen and Henry Higginson ; but these charges, at the close of the year, were carried to the debit of Stephen Higginson, jr. and all the subsequent advances were charged to the account of Stephen Higginson, jr. Although the names of Stephen and Henry Higginson, in that connexion, never appeared in the ledger of T. and A. Cremer, yet, in an account current book kept by them, they stated an account current with Stephen and Henry Higginson ; charged them with the several advances made as aforementioned in the year 1809, and carried the balance of that account at foot to the debit of Stephen and Henry Higginson ; and in July or August, \*1810, they remit- \*331  
ted an account current with Stephen and Henry Higginson for the year 1809, to Henry Higginson in London. On receiving it, Henry Higginson wrote them word, that his partnership with Stephen Higginson, jr. had been dissolved a twelvemonth, and that certain charges (which he enumerated) in the account, ought to be carried to the separate account of Stephen Higginson, jr. ; and certain charges, amounting to upwards of \$10,000, to his separate account ; and that this would make no difference to T. and A. Cremer, as he and his brother were mutually responsible for each other's engagements. On receiving this letter, Messrs. T. and A. Cremer, in the month of September, 1810, made out new accounts current, charging Stephen Higginson, jr. with the items specified by Henry Higginson, and debiting Henry Higginson, with the other items. The balance thus due from Henry Higginson was paid by him at the end of the year 1810 ; and he, at different times, authorized T. and A. Cremer to draw on him for moneys due them from Stephen Higginson, jr. but they did not. From this period Henry Higginson continued in perfect credit, and doing a large business until the last of October, 1811, when he stopped payment, and was, at that time, indebted in a small sum to T. and A. Cremer, which debt they afterwards proved under the commission of bankruptcy against him, and

received their dividends. Early in the year 1812, Stephen Higginson, jr., stopped payment, and in May, 1812, T. and A. Cremer, who did not appear to be informed of it, though they expressed great fears, that it would happen, by letter informed Col. T. H. Perkins, who was then in Europe, that they had made great advances to Mr. Stephen Higginson, jr. and wished him to aid them in obtaining security, but requested him to keep this communication an entire secret from Stephen Higginson & Co. It was also proved, that an active correspondence was \*332 carried \*on between T. and A. Cremer and Stephen Higginson & Co. during the years 1809, 1810, 1811, in which upwards of forty letters were written by the former to the latter. Yet they never gave any notice to Stephen Higginson & Co., either that they were making, or afterwards that they had made, advances to Stephen and Henry Higginson or to Stephen Higginson, jr., nor did they give them any notice on the subject, till the close of the year 1813, long after the parties had become insolvent.

This case turned principally on the facts introduced in evidence, and was argued at great length to the jury. The questions of law, that arose, related to the construction to be put upon the letter of guaranty; the effect of the dissolution of copartnership between Stephen Higginson, jr. and Henry Higginson; and the necessity of proving a notice to the defendants of the advances made by the plaintiffs.

On these points, *Hubbard* and *Prescott*, for the defendants, contended, 1st. That the guaranty of the defendants was a conditional one. That guaranties were to be construed and explained according to the true intent and meaning of the parties; which intention could only be collected from a consideration of the object, to which the guaranty related, and the circumstances under which it was given. That this guaranty was clearly limited, as to its object, amount, and duration. That its object

was to enable Stephen and Henry Higginson to raise funds on the continent during the embargo then existing in this country, which prevented them from shipping goods there for that purpose. That the amount specified was the sum of \$50,000, and the means and mode of payment pointed out plainly indicated the intention of the guarantors, that it should not be considered a continuing guaranty, but applicable only to \*the first \$ 50,000 \*333 advanced. And that it ought to be construed, as limited in its duration, to the continuance of those peculiar circumstances, under which it originated.

2dly. That it was given for advances to be made to the firm of Stephen and Henry Higginson only ; and, therefore, no advances made to either of those individuals, after the dissolution of their copartnership, could be covered by it.

3dly. That it was the duty of the plaintiffs to give notice to the defendants, within a reasonable time, of the advances they had made under the guaranty ; and that their neglecting to do this discharged the defendants from all responsibility.

*Blake* and *Webster*, for the plaintiffs, assented to the rules adopted by the defendant's counsel, for construing the guaranty ; but as to the inferences to be drawn from them, they differed widely.

They contended, 1st. That the situation of the parties, and the commercial objects of Stephen and Henry Higginson totally disproved the argument, that this was a conditional guaranty, and limited to the continuance of the embargo. That nothing expressed in the guaranty itself supported such a construction, and it could not be taken up upon conjecture merely.

2dly. That from the express terms of the guaranty, and the extensive commercial operations contemplated by Stephen and Henry Higginson at the time it was given, it was evidently intended to be a continuing guaranty. That Wilder, the agent of

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Stephen and Henry Higginson, was sent on to the continent for the express purpose of increasing their means, and was to act according to circumstances, and at his own discretion. It was important that an extensive credit should be obtained there; and the guaranty must have contemplated a course of dealings, and \*334 not a single \*transaction. That under such circumstances it could not have been the intention of the parties to cover the first \$50,000 only, that were advanced, when the advances were, from time to time, to be paid off by remittances; but to cover the \$50,000, in which Stephen and Henry Higginson should be indebted to the plaintiffs at one time, and upon a balance of their accounts. That the defendants would themselves have loaned Stephen and Henry Higginson \$50,000, if they could have readily commanded such a sum at the time it was wanted, but not being able to do so, they were willing to give their guaranty for that amount to any other person, who would advance it. That the greatest restriction, therefore, that could possibly be put upon the terms of this guaranty were, that after a debt had been run up to the full amount of \$50,000, all payments made on the general account should be applied to its discharge. In other words, that, if Wilder could open a negotiation with the plaintiffs, and obtain from them advances for the purpose of carrying on the contemplated speculations on the continent, the defendants would be answerable for such advances to the extent of \$ 50,000.<sup>1</sup>

STORY J., (after stating the facts.) There are several questions of law in this case, upon which it is now my duty to instruct you.

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<sup>1</sup> *Mason v. Pritchard*, 2 Camp. R. 436. *Idem*, 12 East R. 237. *Merl v. Wells*, 2 Camp. R. 413. *Bastons v. Bennet*, 3 Camp. R. 220. *Sturgis v. Robbins*, 7 Mass. R. 301.



The first point is, what is the true construction of the letters of the defendants to the plaintiffs, of the 15th of December, 1808, which is the main hinge of the whole of this controversy. I am clearly of opinion, that, in point of law, it is not an absolute undertaking for the payment, in the first instance, of all advances made to Stephen and Henry Higginson, not exceeding 50,000 dollars. It is in fact an \*original collateral undertaking \*335 to guaranty the payment of such advances ; and consequently the debt is properly the debt of Stephen and Henry Higginson, and the defendants are liable only upon their default, and to the extent of the guaranty. It has been asserted, that the guaranty is conditional, having reference to the then state of our commerce ; and that the embargo being removed, the implied condition, upon which the advances were to be made, viz. the impracticability of Stephen and Henry Higginson's remitting funds to Europe, was completely done away before any advances were made ; and that the defendants are, therefore, absolved from all responsibility. There is nothing in this argument. The letter contains no such implied condition ; and it would be extremely dangerous for courts of law to indulge themselves in searching after such hidden and conjectural meanings in such an instrument. It is sufficient for us, that the language of the letter speaks not in such ambiguous or hypothetical terms. As little ground is there for the argument, that the plaintiffs were, by the terms of the letter, bound to look to the application of the funds, advanced by them to the agent of Messrs. Stephen and Henry Higginson, under the guaranty. The plaintiffs were not bound to see, whether the agent properly applied the advances or not ; or whether he purchased with them French goods, or any other goods. He was to act solely under the instructions of his principals, with which the plaintiffs had nothing to do ; and the defendants are liable for all advances, *bonâ fide* made under the

guaranty, even though the agent may have applied them contrary to the instructions of his principals.

Having thus fixed the interpretation of the letter on this point, that it is a mere guaranty of the debt of third persons, the next question upon its construction is, to whom are the advances to be made. If there be any thing clear in this cause, it is, that the  
\*336 advances are to be made to \* Stephen Higginson, Jr. and Henry Higginson, then copartners in trade, under the firm of S. & H. Higginson. It follows, therefore, that it covers only advances made to them jointly on their joint credit, and not advances made to them severally upon their several credit. Unless then it shall be completely established, that the advances were made on the joint account of the firm, there is an end of the plaintiffs' case.

Another question upon the construction of this letter is, whether it contains a limited or a continuing guaranty; in other words, whether it be a guaranty for advances made to the amount of 50,000 dollars, and when that sum is once advanced, it is exhausted; or, whether it covers any further advances, made from time to time, after the 50,000 dollars have been once advanced, provided, at the time of such advances, the balance then due to the plaintiffs, does not, with such advances, equal the stipulated sum of 50,000 dollars. Upon examining the terms of this letter I am of opinion, that it is a guaranty limited to a single advance of 50,000 dollars; and that when once this sum is advanced, the guarantors are no longer liable for any future advances, whatever may be the state of the accounts between the parties.

The language of a letter should be very strong, that would justify a Court in holding the guaranty to be a continuing guaranty, which is to cover advances, from time to time, to the stipulated amount, *toties quoties*, until the guarantor shall give notice to the contrary. I see nothing in this letter to justify such a conclusion; and in every doubtful case, I think, that the presumption ought to be against it. If, therefore, in the present case the

advances to Stephen and Henry Higginson ever equalled 50,000 dollars, all subsequent advances, although the debt of Stephen and Henry Higginson may have been, at the time, diminished by payments, so as to be far within that sum, are beyond the reach of the guaranty.

\*The next point in the cause, is, as to the effect of the dis- \*337  
solution of the partnership of Stephen and Henry Higginson. From the moment that dissolution was made known to the plaintiffs, all right to make future advances upon the credit of the firm was completely done away. To be sure, the plaintiffs, by agreeing to make the stipulated advance of 50,000 dollars, and specifying that in writing to Mr. Wilder, and agreeing to accept his bills to that amount, might have rendered themselves liable to pay to a third person, who should take the bills upon the credit of that written agreement, to the full amount. And in relation to contracts actually made by Mr. Wilder upon the footing of that agreement, and advances made, or agreed to be made by the plaintiffs to satisfy such contracts, before notice of the dissolution, the plaintiffs would be entitled to hold the defendants liable under the guaranty, if the contracts were made with third persons upon the faith and credit of the plaintiff's acceptance. But as to all other future advances, notice of the dissolution of the partnership was a complete revocation of all authority to make such advances, at least so far as respects the defendants. The dissolution was publicly announced in May, 1809, in the newspapers in Boston, to take place on the first day of September of the same year. The defendants had due notice of such dissolution, and had a right to consider, that all advances made by the plaintiffs, after a knowledge of such dissolution, were advances made on the credit of the partners severally, and not on the partnership account, or on the credit of the guaranty of the defendants. And even if there was a secret understanding between Stephen Higginson Jr. and Henry Higginson, after such

dissolution, that the shipments made by Mr. Wilder, and the advances made by the plaintiffs for the payment thereof, should be considered as made for their joint interest, in the same manner \*338 as if the partnership were not dissolved, and the plaintiffs \* upon the supposition of such joint interest actually made such advances, still if this was unknown to the defendants, and they never had notice of such understanding, they are not bound by their guaranty for the payment of such advances.

As to the manner, in which the payments and remittances, made by Stephen and Henry Higginson, or by Stephen Higginson, Jr. to the plaintiffs are to be applied, the law is perfectly clear.

Where a debtor owing several debts, makes any payment to a creditor, he has a right to apply it to what debt he pleases. If he makes no specific appropriation, the creditor may apply it as he pleases. And where neither party appropriates it, the law will apply it according to its own notion of the intrinsic equity and justice of the case. In the present case, the plaintiffs had a guaranty of the defendants for the advances to the amount of 50,000 dollars, and a guaranty of Henry Higginson for advances to the amount of 50,000 florins ; and they further agreed, at least as early as the 8th of January, 1800, to give to Stephen Higginson, Jr on his own account an additional credit of 50,000 dollars. Now, where a creditor holds several funds, or, what is the same thing, has agreed to advance money upon the footing of several distinct credits, he is bound to state at the time of the advance, upon which credit it is actually made. At least, if he does designate in his books or correspondence the particular credit, upon which particular advances are made, he is not at liberty to change the credit afterwards upon any new occurrence, which may materially affect the rights of third persons.

In the present case, the plaintiff has charged certain advances, as made on the credit of the guaranty of the defendants, and

others, as on the guaranty of Henry Higginson ; and others are without any specific statement of any guaranty, on which they were made. As to the two former \* advances, the plaintiffs are \*339 bound by their original charges, and cannot now transfer them from the one guaranty to another. And as to the last, they must be deemed, under the peculiar circumstances of this case, to have been made on the several credit of Stephen Higginson, Jr. to whom they are charged.

There is another point in this cause, which, if it were alone, would, in my judgment, be conclusive against the plaintiffs. Assuming that all the advances of the plaintiffs were actually made upon the credit of the partnership of Stephen and Henry Higginson ; yet it appears, that in August, 1810, the plaintiffs, at the request of Henry Higginson, and with the implied assent of Stephen Higginson, Jr., and upon a statement, that the partnership had been dissolved for a whole year before that time, did actually transfer the partnership balance, then due, in certain proportions, to the several and separate accounts of Stephen Higginson, Jr. and Henry Higginson, and gave credit to them severally for their respective shares of such balance, until after they both became insolvent (more than three years afterwards) without the facts having been in any way communicated to the defendants. In my judgment, this giving a new and unlimited credit to them severally, upon their several accounts, for that balance, without any communication with, or assent by the defendants, was a complete discharge of the defendants from their original guaranty. It was in the highest degree injurious to them, and must be considered, so far as respects the defendants, as an agreement by the plaintiffs to hold that balance upon the sole credit of the partners themselves in the proportions, with which they were charged in their separate accounts. If a creditor will undertake to give a new credit to his debtor, and thereby materially to change the situation of a surety, and *à fortiori* of a

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Cremer v. Higginson *et al.*

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guarantor, the latter is absolved from all responsibility, unless he has notice of, and becomes party to, the new transactions.

- \*340 \*The last point of law, which it is necessary to consider, is, whether any notice was necessary to have been given of the amount of the advances made by the plaintiffs to the defendants. It appears that the plaintiffs did inform the defendants of their readiness to make the stipulated advance of \$50,000, as soon after their receipt of the letter of guaranty as was practicable; so that the point is narrowed to the consideration of the question, whether notice was necessary of the amount of the advances, after they were actually made. And I am most distinctly of opinion, that it was the duty of the plaintiffs, within a reasonable time after the advances were actually made, to give notice thereof to the defendants, and that reliance was placed upon their guaranty to insure the repayment. And if notice was not given in a reasonable time, nor until after a material change in the circumstances of the debtors, such laches of the plaintiffs was a complete discharge of the defendants from their guaranty. The first notice given to the defendants of any advances in the present case, was not until near the close of the year 1813, more than three years after all the advances were made, and when both of the debtors had become insolvent. During this period an active correspondence was kept up between the plaintiffs and the defendants, nearly fifty letters having passed between them, in which not one syllable is to be found relative to any advances to Stephen and Henry Higginson, or either of them. Nor is this extraordinary silence imputable to any accident or mistake. It appears from a letter of the plaintiffs to Col. Perkins (a witness in the case) that it was studied and intentional. Under these circumstances I am bound to declare, that the law holds the plaintiff guilty of such laches, as discharges the defendants from all liability for the advances actually made.

*Verdict for the defendants.*

# CIRCUIT COURT OF THE UNITED STATES.

## Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1817, AT PROVIDENCE.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
Hon. DAVID HOWELL, District Judge.

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### CHURCH v. MARINE INSURANCE COMPANY.

Where a vessel was stranded, and afterwards, before abandonment, was gotten off without material injury, but was, in the intermediate time, sold by the master at public auction, and purchased by him, it was held, that the plaintiff was not entitled to recover for a total loss.

**A**SSUMPSIT on a policy of insurance on the schooner *Topaz* for three months, the risk to be continued at the same rate, if, at the time, she shall not have arrived at Providence. The loss was alleged to be by perils of the sea and stranding. Plea, the general issue.

At the trial it appeared that the policy was underwritten on the 2d of April, 1816. On the 12th of the same month the vessel was stranded on a bar, called New River Bar, about thirty miles below Wilmington, in North Carolina. The master and crew abandoned the vessel soon after the stranding, and returned the next day and got on shore her sails, rigging, &c. ; and on the 20th of the same month the hull, as it lay, and the sails and rigging, were, under the direction of the master, who was also a part owner, sold at public auction. The whole was bought by one Kendrick, \* who was a shipper on board of the \*342

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schooner; and on the same day he conveyed all his right and title to the master, who immediately took measures to get the schooner off, and on the 23d of the same month, by the assistance of favorable winds and tides, effected his purpose. On the 29th of the same month, the plaintiff, who was a part owner, having received information of the disaster, abandoned to the defendants for a total loss. The schooner received very little damage from the stranding, and was soon repaired, and made a voyage with a cargo to Philadelphia, and from thence safely arrived at Providence. The master certified, that at the time of the stranding he was in prosecution of his voyage under a charter-party with Kendrick, by which he engaged to perform a voyage from New York to New River Inlet, there to take a cargo of lumber for Wilmington, and perform three trips backwards and forwards, and then return to New York. And that, in consequence of the stranding, the subsequent part of the adventure was entirely abandoned by the parties to the charter-party. No charter-party was produced. There were some other circumstances, on which the defendant relied to establish his first point of defence, but which it is unnecessary to state in detail.

*Searle*, for the plaintiff, contended that, under these circumstances, the plaintiff was entitled to recover for a total loss; and he cited and relied on the case of *Sawyer v. Maine Fire and Marine Insurance Company*, 12 Mass. R. 291.

*Hazard*, for the defendant, contended, 1. That the loss was occasioned by fraud or gross negligence. 2. That the loss, if *bonâ fide*, was, by the subsequent events, a partial loss only, and that the plaintiff was not entitled to recover upon the abandonment, as for a total loss.



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\* STORY J. The question of fraud or gross negligence is a question of fact, which I shall leave to the jury, with proper directions as to the evidence. But as to the other point, I am decidedly of opinion, that there is no color to claim for a total loss. The vessel was stranded, and it is true, that if the abandonment had been made, while she remained in that state, the plaintiff might have been entitled to claim as for a total loss. But here the vessel was actually gotten off, without having sustained any essential injury, before the abandonment was made. It is argued, however, that the voyage under the charter-party was defeated, and a loss of the voyage is a good cause of abandonment. But how was the voyage defeated? Certainly not by the incapacity of the vessel to perform it, in consequence of any perils insured against; for she sustained very little damage, and was soon repaired, and capable of performing the chartered voyage. The voyage then was voluntarily abandoned by the parties, as not worth pursuing. But this, in respect to the underwriters, is no cause of abandonment, if the ship was capable of performing it. They engage, that the ship, notwithstanding any of the perils insured against, shall be capable of performing the voyage, not that she shall actually perform it. A loss of the voyage, as to the cargo, is not a loss of the voyage as to the ship. This is the doctrine of the Supreme Court;<sup>1</sup> and, of course, is of conclusive authority in this Court, even if I entertained (which I certainly do not) any doubts of its correctness.

The doctrine, too, is equally well recognised in England.<sup>2</sup> The most, that can be said in this case, is, that the voyage was retarded by the accident. But the mere retardation of a voyage,

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<sup>1</sup> *Alexander v. Baltimore Ins. Co.*, 4 Cranch R. 371.

<sup>2</sup> *Everth v. Smith*, 2 Maule & Selw. R. 278. *Falkner v. Ritchie*, Ib. 290. *Cazalet v. St. Barbe*, 1 T. R. 191. *Parsons v. Scott*, 2 Taunt. R. 363.

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is no ground for an abandonment as for a total \*loss.<sup>1</sup> Besides; this is an insurance on time; and it does not insure any specific voyage, much less does it undertake to guaranty the performance of the voyage in the charter-party.

But it is argued, that the vessel was sold by the master while stranded; and that the ownership, once destroyed, never can return to the plaintiff, unless he elects again to become owner; and that, as the plaintiff has never made such election, the loss, as to him, continues total. And this case is assimilated to the case of a purchase by the master under a judicial sale. Assuming that the purchase of a ship, under a judicial sale, can be legally made by the master on his own account, and not solely for the benefit of his owners (on which I give no opinion;) and assuming also, that the owners in such case may recover as for a total loss (on which also, until better instructed, I reserve giving any opinion); it is sufficient to say, that the present is not such a case.<sup>2</sup> The sale, in this case, was made by the master, or under his immediate direction; and nothing can be clearer than that, at such a sale, he could not become a purchaser. He cannot be at once vendor and vendee. The sale was either merely an amicable sale, and the whole property bought in on account of the master; or it was a *bonâ fide* sale, which the

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<sup>1</sup> *Anderson v. Wallis*, 2 Maule & Selw. R. 240. *Pole v. Fitzgerald*, Willes R. 641. *Everth v. Smith*, 2 Maule & Selw. R. 278. *Falkner v. Ritchie*, Ib. 290.

<sup>2</sup> Marshall on Insur. B. 1, ch. 13, § 1, p. 581. *M<sup>r</sup> Masters v. Shoolbred*, 1 Esp. R. 237. *Story v. Stretzell*, 1 Dall. R. 10. *Storer v. Gray*, 2 Mass. R. 565. *Oliver v. Newburyport Ma. Ins. Co.*, 3 Mass. R. 37. *Sawyer v. Maine Fire and Marine Ins. Co.*, 12 Mass. R. 291. *Queen v. Union Ins. Co.*, Condry's Marshall on Insur. 582, b, note. *Abbott v. Broome*, 1 Caines R. 292. *United Ins. Co. v. Robinson*, 2 Caines R. 280. *S. C.*, 1 Johns. R. 592. *Abbot v. Sebor*, 3 Johns. Cas. 39. *Walden v. Phoenix Ins. Co.*, 5 Johns. R. 310. *Ogden v. Fire Ins. Co.*, 10 Johns. R. 177. *S. C.*, 12 Johns. R. 25. *Havelock v. Rockwood*, 8 T. R. 268.

purchaser declined to enforce, and released all his right acquired by the sale to the master. \* In either view, it is a void or ineffectual sale. Nothing can be better settled, than that an agent or trustee cannot, directly or indirectly, become the purchaser of the trust property, which is confided to his care. The law will not suffer any man to earn a profit, or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at a public or private sale. This case then stands before the Court, as if there was no sale; the ownership has never been legally divested, and the ship was, at the time of the abandonment, in good safety. There is no foundation, upon which to rest the claim for a total loss. \*345

*Verdict for the plaintiff for a partial loss.*

# CIRCUIT COURT OF THE UNITED STATES.

## Spring Circuit.

NEW HAMPSHIRE, MAY TERM, 1818, AT EXETER.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN S. SHERBURN, District Judge.

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### AMOS BLANCHARD v. THOMAS HAVEN AND OTHERS.

Where a cruise was broken up by the wrongful desertion of the crew, after the privateer returned to her home port in consequence of distress, and the owners were thereby obliged to abandon the cruise, and a new one was undertaken by a crew composed partly of the old crew, and partly of other persons, it was held that the first cruise was completely determined, and that no persons employed in the *first* cruise, and not in the *second* cruise, were entitled to shares in prizes made in the *second* cruise.

**T**HIS case came on to be heard upon a statement of facts agreed by the parties as follows.

On the 7th of November, 1814, the plaintiff entered as prize master on board the privateer *Macedonian* of Portsmouth, Penn Townsend commander. The agreement between the owners, officers, and crew, contained among others the following articles; viz.

“Art. 5. That the cruise shall be where the owners may direct. If they see cause to leave it to the Captain, he shall have full power to alter or prolong the cruise; and it shall not be considered as ended until the arrival of said vessel at Portsmouth.”

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\*“ Art. 12. It is agreed that this cruise shall be considered not more than one hundred, nor less than ninety days. The captain is to end the cruise, whenever all his men that can be spared are put on board prizes.”

“ Art 15. And finally we do by these presents bind ourselves each to the other, for the faithful performance of all and singular the provisions and covenants above specified, in consideration of our becoming the crew of said schooner Macedonian, and it shall be binding upon us to all intents and purposes, as if we had received monthly wages for the time fixed for said cruise.”

“ Art. 8. Should any man desert, or not render himself on board, after verbal notice by the agents, or by publishing the same in one public newspaper, he shall forfeit all his share or shares.”

The plaintiff signed these articles of agreement, and was entitled by the same to four shares of the crew's moiety of the prizes.

In pursuance of said articles, the said privateer sailed on a cruise in said month of November, being duly commissioned, and with the plaintiff on board. On the 16th of said November, she captured and manned out a prize, and put the plaintiff on board as prize master thereof. After cruising a short time, the said privateer sprung her bowsprit, and put into said Portsmouth to refit, where she arrived on or about the 8th of December, 1814.

On the 8th of December the owners of said privateer met, and passed the following vote, viz. “Voted, that the agents be requested to inform the officers and crew in some public newspaper, that the first cruise is not considered up, and request them to repair on board when notified.”

The officers and crew were notified accordingly by the agents to repair on board by a certain day, after which, on the 23d of said December, the said owners again met, and passed the following votes, viz. “Voted, that whereas \*only ten officers and \*348

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*Blanchard v. Haven et al.*

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four men rendered themselves on board the Macedonian on the day, which they were notified, agreeably to the articles of agreement, and whereas we have by such notification given an opportunity to all purchasers of seamen's shares, to bring forward those of whom they have purchased; and whereas we are compelled in consequence of their not appearing as aforesaid, to give up the first cruise. Therefore,

"Voted, that we now proceed to the choice of officers for the second cruise of the Macedonian. The meeting then proceeded to the choice of officers, when the following gentleman were unanimously chosen, viz. Penn Townsend, Esq. Captain; Mr. John H. Davis, first lieutenant; Mr. Robert Blunt, second lieutenant."

"Voted, that the agents proceed to ship about eighty men, including officers, for the second cruise of the Macedonian."

The facts contained in said votes are true. The same persons chosen for captain and lieutenants for said second cruise, were captain and lieutenants the said first cruise.

The agents, pursuant to the vote aforesaid, shipped eighty men, including officers for said cruise, who signed articles of agreement on the 7th of January, 1815; the 5th, 8th, 12th, and 15th articles of which were the same as the articles executed on the 7th of November, aforesaid, which have been recited.

Before the sailing of said privateer on her said second cruise, the plaintiff came to Portsmouth, and the officers and agents were desirous that he should go, but he remained at home, stating that he considered himself as on parole.

On or about the said 7th of January the said privateer sailed on her said second cruise. On her said second cruise she captured several prizes, one within ninety days from the time that she commenced her said first cruise, and the residue after the expiration of the said ninety days.

\* The facts stated in Joseph Benson's deposition were admitted to be true, and the deposition was made a part of this case; and also the cartel for the exchange of prisoners of war between Great Britain and the United States. It was also admitted that the votes of the proprietors were known to Blanchard.

The deposition of Benson was as follows :

I, Joseph Benson, do testify and say that I was a seaman on board the privateer Macedonian, on her first cruise; of which privateer Penn Townsend was commander. That a few days after the said privateer was out, she captured a prize, and that Amos Blanchard was put on board the prize as prize master, and this deponent as one of the prize crew. That on the third day after we were put on board the prize, we were recaptured by the Newcastle, British frigate. Said Blanchard and myself were put on board the Newcastle, where we remained three weeks, when Blanchard was put on shore at Cape Cod. That a day or two before Blanchard was put on shore, Blanchard told the deponent that he, Blanchard, was going ashore, and that he would try to get the rest clear. That he, Blanchard, was going ashore to carry some clothes and money to a British midshipman, who was a prisoner in the hands of the United States forces at Salem, who had been recaptured in going on shore in a boat. On the morning of the day when Blanchard was put on shore, I saw Captain Stewart, the commander of the Newcastle, deliver to Blanchard some clothes and a letter; and heard him tell Blanchard to deliver the clothes and money himself to the said midshipman, and not intrust them to any body else. And he also told Blanchard, that he was not to take up arms against the English flag during the war, and Blanchard told him, that he should not, for he could live at home without it. I further testify, that at the time Blanchard was \*sent on shore, there was a Mr. Chapman on board \*350 the Newcastle, a prisoner, who had been a prize master in an

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American prize, and recaptured, who was desirous of going on shore, but Captain Stewart refused, saying he did not make the war, and would not make peace; and that he should not let Blanchard go, but to carry the clothes and money to the midshipman. Chapman was sent to Halifax, and detained till the close of the war. I was also sent to Halifax, and detained till the close of the war. On the same day that Blanchard went ashore, we were put on board a vessel to be sent to Halifax. Blanchard was sent ashore in one of the Newcastle's boats.

The questions submitted to the Court upon the above facts are :  
1st. Whether the plaintiff is entitled to four shares of the proceeds of all the prizes captured by said privateer after the said 7th of January, which are to be distributed among the crew ?

2dly. Whether the plaintiff is entitled to share as aforesaid, in the prize captured as aforesaid, after the said 7th of January, and within ninety days from the commencement of the said first cruise ?

If the court should be of opinion that the plaintiff is entitled to share in the whole, or a part of the prizes captured after the said 7th of January, then judgment accordingly is to be rendered for the plaintiff, for such sum as shall be agreed upon by the parties, or as a commissioner or commissioners, to be appointed by the Court, shall report in default of such agreement. If the Court should be of opinion that the plaintiff is not entitled to share as aforesaid, judgment is to be rendered against him, as in case of nonsuit.

*Pitman*, for the plaintiff, contended that the first cruise was  
\*351 wrongfully broken up by the original crew; and that \* the second cruise was to be considered so far as respected that portion of the crew who were parties to the shipping articles for the first cruise, as a mere continuation of the first cruise. That the



coming into Portsmouth on account of distress, did not legally put an end to the first cruise ; and that the plaintiff, not having been concerned in the wrongful act of the crew in deserting the privateer, was to be considered as a prize master, entitled to share in the prizes made during the second cruise ; which, upon the ground already stated, was but a continuance of the original cruise. And he cited *The Brutus*, 2 Gallis. R. 526.

STORY J. This case differs in several important particulars from that of *The Brutus*. There the cruise was attempted to be broken up in a foreign port by the officers and crew, without the consent of the owners of the privateer. And it was held, that the officers and crew could not set up their own wrongful act as a dissolution of the cruise. It was material also in that case, that the homeward voyage was within the scope of the original articles ; and the cruise was in fact continued by the original crew. It is true, that by the return of the privateer to Portsmouth in distress, the cruise of the *Macedonian* was not legally terminated. But it was in fact broken up by the desertion of the crew. The owners did not concur in that wrongful proceeding. They acted with good faith ; and certainly had a right to employ their own vessel on a new cruise, when the former cruise was entirely abandoned by the officers and crew. But even if the owners had wrongfully put an end to the cruise at Portsmouth, I do not know, that it would have helped the plaintiff. He might then have been entitled to an action for damages for the injury sustained by him by such wrongful act. But it seems to me, that the owners have a right to the possession and use of their own vessel ; and that from the nature of the service, they have a right

\* to break up a cruise in the home port, taking the consequences \*352 of such act, if it be a breach of any covenant, into which they have entered. Suppose the case of an agreement in the nature of a charter-party for a voyage, are not the owners at liberty to

prevent their vessel from proceeding on the voyage, taking their chance of an action for the breach of their contract? Does such a contract divest the legal ownership of the property during the voyage? But in the present case, it is conceded, that the owners are in no default. The first cruise was in fact terminated. New engagements were entered into for a new cruise by parties, who were competent to make such engagements. How then can the Court say, that the second cruise was a continuation of the first? The first cruise was abandoned, wrongfully indeed, by the original crew, but still in point of fact and law completely abandoned.

This is an attempt to claim prize proceeds, earned in the second cruise, to which the plaintiff was no party, either in law or in fact. He entered into no contract with reference to it; nay, he declined having any thing to do with it. It is, in fact, an action for damages, for the illegal act of breaking up the first cruise, in the shape of an action for money had and received. As to the shares of the owners and the new crew engaged in the second cruise, it is admitted, that the plaintiff is not entitled to claim any deduction. But he claims to deduct from the shares of each of the crew shipped on the first and second cruises, an amount equal to the shares he would have been entitled to, if the prizes had been made in the first cruise, or if the first cruise had not been wrongfully broken up by their desertion. Undoubtedly by their desertion they forfeited all claim to the prizes captured on the first cruise. And it may be, that an action for damages lies against them in favor of the plaintiff. But certainly there is no specific \*353 claim or lien on their property earned in the second cruise, \* to respond those damages. Suppose, instead of shipping in the Macedonian a second time, they had shipped in some other privateer, can there be any pretence, that the prize money earned in such a cruise could have been held to respond these damages? In what possible way could it be considered as money had and

received to the use of the plaintiff? In point of law, I do not distinguish between the case put and the case at bar. The cruises were as distinct, as if they had been made in different privateers.

On the whole, the District Judge and myself are clearly of opinion, that the action cannot be sustained. We adhere to the case of *The Brutus*, and feel no inclination to abandon any of its positions. But this case is not governed by any principle decided in that. Let the plaintiff be nonsuited according to the agreement of the parties.

*E. Cutts, Jr.*, was to have argued for the defendants.

# CIRCUIT COURT OF THE UNITED STATES.

## Spring Circuit.

MASSACHUSETTS, MAY TERM, 1818, AT BOSTON.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
Hon. JOHN DAVIS, District Judge.

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### THE SCHOONER BETSY, DRINKWATER CLAIMANT.

A libel for a Statute forfeiture should substantially agree with the terms of the Statute, otherwise it is bad.

In a libel on the 50th section of the Revenue Act of the 2d of March, 1799, ch. 128, it is not necessary to allege the goods to be of foreign growth or manufacture.

The 27th section of the Revenue Act of the 2d of March, 1799, ch. 128, comprehends foreign as well as American vessels, bound to the United States.

Condemnation on the facts.

**T**HIS was a case of seizure for the violation of the 27th and 28th sections of the Revenue Collection Act of the 3d of March, 1799, ch. 128. The libel of information charged, that on the 10th day of September, 1817, a certain ship or vessel, whose name was as yet unknown, laden with a cargo, consisting of various articles of goods, wares, and merchandises, "of foreign growth and manufacture, which were liable to the payment of duties on importation into the United States," the said vessel being then and there bound to the United States from a foreign port, did arrive within four leagues of a district of the United

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The Betsy.

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States ; and that, after her arrival as aforesaid, on the same day, and before \* the said ship had come to the proper place for the \*355 discharge of her cargo, or any part thereof, a part of the cargo of the said vessel, to wit, forty-two pipes of rum, a quantity of logwood, and various other articles, were, without any unavoidable accident, necessity, or distress of weather, unladen out of said vessel ; and being so unladen, were afterwards, on the same day, without any unavoidable accident, necessity, or distress of weather, on the high seas, and "within four leagues of a Collection District of the United States," put and received forthwith into the said schooner Betsy, contrary to the form of the Statute, &c.

The claim contained a general denial of the forfeiture. At the hearing in the District Court of Massachusetts, a decree of condemnation was pronounced ; from which decree an appeal was taken to this Court.

The cause was argued by *J. T. Austin* for the claimant, and by *G. Blake*, District Attorney, for the United States ; but as it turned principally on matter of fact, it is unnecessary to report it at large.

**STORY J.** The libel in this case does not exactly conform to the language of the sections of the Statute, on which it is founded. To bring the case within the Statute, the unlading must be within the limits of a district of the United States, or within four leagues of the coast of the United States. The allegation propounds in one place, that the arrival of the ship was within four leagues of a district of the United States ; and in another place, that the receiving into the Betsy was within four leagues of a Collection District of the United States. The limits of a district, and of the coast of the United States are not, or at least may not be, coincident. Many of the districts of the United States include bays and other waters of the sea. But the coast of the

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The Betsy.

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United States, as used in this Statute, is properly the shore of  
\*356 the sea, *littus maris*, or the *costera maris* \* of our ancient juridical writers.<sup>1</sup> I shall, however, allow this inaccuracy to be amended, at the same time suggesting, that the libel is, in some respects, more special than the Statute requires. It does not seem necessary to assert, that the goods are of foreign growth or manufacture, or liable to the payment of duties. The Statute only requires, that they should have been brought from a foreign port. And in some cases it may be perilous to tie up the allegation within narrower limits, than the law itself has prescribed.

Upon the first examination of this case, a doubt occurred to my mind, whether the 27th section of the Act applied to any foreign vessel in the predicament of that before the Court. The doubt arose in this way. The 23d section of the Act declares, that no goods, wares, or merchandise shall be brought into the United States from any foreign port or place in any ship or vessel, belonging in whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, unless the master, &c. shall have on board a manifest, the form of which is prescribed by the same section; and it then provides, that if merchandise shall be imported by citizens or inhabitants of the United States in vessels, other than of the United States, the manifests shall be in a similar form, except as to the description of the vessel. The 25th section requires the master of any ship or vessel, belonging to a citizen or citizens of the United States, laden with goods aforesaid, and bound to a port or place in the United States, on his arrival within four leagues of the coast thereof, or within any of the bays, &c. thereof, upon demand to produce such manifest, &c. to such Officer of the Customs, as shall first come on board his vessel for his inspection. The 26th

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<sup>1</sup> Spellman, *Gloss.* 192.

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section declares, that if any master of any ship or vessel, "laden as aforesaid," \* and bound to any port or place in the United \*357 States, shall not, upon his arrival within four leagues of the coast thereof, or within the limits of any district thereof, &c. produce such manifest to the proper officer upon demand, &c. he shall forfeit five hundred dollars. Then comes the 27th section, which among other things declares, that "if after the arrival of any ship or vessel, so laden with goods as aforesaid, and bound to the United States, within the limits of any of the districts of the United States, or within four leagues of the coast thereof, any part of the cargo of such ship or vessel shall be unladen for any purpose whatever from out of such ship or vessel, before such ship or vessel shall come to the proper place for the discharge of the cargo," &c. &c. the goods, &c. so unladen and unshipped shall be forfeited, except in the case of some unavoidable accident, necessity, or distress of weather. And the 28th section declares, that if any goods so unladen from on board such ship or vessel, shall be put or received into any other ship or vessel, or boat, except in the case of such accident, necessity, or distress as aforesaid, the ship, boat, or vessel, in which they shall be so put, shall be forfeited. Unless, therefore, there be an unlawful unlading within the 27th section, no forfeiture can be inflicted under the 28th section. The question then is, what ship or vessel is within the 27th section, the descriptive words being any ship or vessel, "so laden with goods as aforesaid." It is very clear, that the preceding sections had principally, if not altogether, in view American ships, or foreign ships having on board goods on American account. And the doubt was, whether the words of reference, "so laden with goods as aforesaid," did not limit the description to vessels within the purview of those sections. On farther consideration, however, I am satisfied, that the doubt cannot be sustained. The words in the 27th section are, "any ship or vessel," dropping

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the additional description in the 23d, \* 24th, and 25th sections, "belonging in whole or in part to a citizen or citizens"; which omission would seem to indicate some change of intention. And the words "so laden with goods as aforesaid," must be construed, as the words "laden with goods as aforesaid," in the 25th section. And it is clear that, in that section, they must be interpreted to mean the goods specified in the 24th section; that is to say, goods imported or brought from any foreign port or place. So that the 27th section in fact should read, "If after the arrival of any ship or vessel, laden with goods, brought from any foreign port or place, and bound to the United States, within the limits of any district of the United States, or within four leagues of the coast thereof, any part of the cargo shall be unladen," &c. The language is here sufficiently broad to comprehend any vessel, of any description whatever, foreign or American, bound to the United States. And the policy of the Act equally applies to all vessels; and indeed more strongly to foreign vessels; since frauds committed by them in evasion of the revenue laws are less easily detected, than like frauds are under the regulations applicable to American vessels. It is farther proper to be considered, that foreign vessels with goods on board, imported by citizens of the United States, are within the express purview of the 23d section, and therefore of the 27th section; and it cannot be presumed, that the legislature could have contemplated a discrimination, which should include them, while it excluded foreign vessels laden on foreign account from the grasp of the 27th section. The language of the Statute, therefore, being sufficiently comprehensive, and the mischief being the same, I cannot attempt to sustain an exception, not warranted by the terms or the spirit of the Statute.

Having disposed of this preliminary point, we may now advance to the objections, which have been urged on behalf of the claimant.



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The Betsy.

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\* The first objection is, that the ship was not bound to the United States. It turns out in evidence, that she was a Spanish ship, not originally bound to the United States, but captured by a privateer, under the flag of the government of Buenos Ayres. She came to an anchor in Huzzy's Sound, within a district of the United States. Her prize-master was a citizen of the United States, belonging to Portland ; and the unlading was with the assent of the prize-master, in concert with some inhabitants of Portland, after her departure from the port, where she had anchored, for the obvious purpose of having the cargo imported into the United States, and yet avoiding the expense of alien duties. I cannot under such circumstances doubt, that her destination was really, after capture, for the United States ; and that her arrival off Portland was voluntary, and with an intent, *per fas aut nefas*, to dispose of the cargo in the United States.

A second objection is, that the unlading was not within four leagues of the coast of the United States ; and a third, that the unlading was from necessity. There is nothing in the facts of the case, that affords a shadow of ground to sustain either of these objections. The whole enterprise of the prize crew was to smuggle, or at least to land the cargo in the United States, in such manner as should best comport with their own interests ; and it was executed without the slightest regard to our laws, any farther than as those laws might afford them plausible pretences or excuses more effectually to cover their own designs.

These objections failing, the Betsy must be condemned ; for there can be no doubt, that her owner and master acted with a full knowledge of all the facts, and co-operated in the original design, by receiving the goods on board immediately from the ship.

*Decree affirmed with costs.*

## \* THE SLOOP ABBY, BARNABAS HEDGE, &amp; C. CLAIMANTS.

When the seizure is made within the limits of a judicial district, the District Court of that district has exclusive original cognizance thereof. And if brought into another district, the Court will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any District Court, into which the property is brought.

If a seizure be abandoned, no jurisdiction attaches to any Court unless there be a new seizure. But to constitute such an abandonment, there must be an unequivocal act of dereliction. If after a seizure of a ship, the master agrees to navigate her into port under the direction of the seizer, and then to give her again into the possession of the seizer, this is no abandonment, although in consequence of such agreement the seizer's crew are withdrawn from the ship.

A party, who means to except to the jurisdiction of the Court, in a case of seizure, must plead to that jurisdiction. If he files a claim and plea to the merits, on which the parties are at issue, it is a waiver of any exception to the jurisdiction. On such claim and plea, no question as to the place of seizure is before the Court.

**INFORMATION** of seizure against the sloop Abby. 1st. For being engaged in a trade other than that for which she was licensed (i. e. the coasting trade) against the 3d section of the Coasting Act of the 18th of February, 1793, ch. 8. 2dly. For unlading goods without a permit, against the 50th section of the Revenue Collection Act of the 2d of March, 1799, ch. 128.

The case was argued by *Bassett* and *Austin* for the claimants, and by *G. Blake*, District Attorney, for the United States.

**STORY J.** The material facts in this case are the same as those disclosed to the Court in the case of the *Betsy*.<sup>1</sup> The Abby acted in the character of a salvor, until after the arrival of the Spanish ship, now known to be the *Industria*, in Huzzy's Sound; when, having ascertained from the proper authority, that the alien duties and alien tonnage would be payable by the ship  
 \*361 and cargo if libelled \* for salvage, the master of the Abby seems to have relinquished his claim, and to have co-operated with the *Betsy* in another enterprise. I say co-operated, for the *Betsy* and the Abby were lying together in Huzzy's Sound, when the Span-

<sup>1</sup> Ante, 358.

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The Abby.

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ish ship went out to sea in the night ; and in the morning, the Betsy was discovered alongside of the ship receiving her cargo on board, and the Abby was in company. It is true, that the Abby had but a very small quantity of the cargo on board ; but she had a great part of the sails, rigging, anchors, and cables of the ship. I believe only one barrel of sugar was found on board ; but as this is unaccounted for in any other manner, I must presume, that it was taken from the ship. The ship must, on her arrival in Huzzys's Sound, be deemed to have been, to all intents and purposes, in the possession and charge of the master of the Abby and his co-salvors. Her departure in the night, and under the circumstances of this case, was in manifest violation of the provisions of the 29th and 30th sections of the Revenue Collection Act, of 1799,; ch. 128. There is no reason to suppose, that the master of the Abby was not perfectly conusant of, and a party to, that transaction ; and the Court must wink very hard, if it did not perceive, that the meeting of the Betsy and Abby with the ship was not accidental, but in pursuance of previous concert. The question then comes to this, whether the Abby was at this time engaged in a trade, for which she was licensed. It is immaterial, whether she had on board one bag or one hundred bags of sugar received from the ship. She was licensed solely for the coasting trade ; and if she was then employed in assisting in the unlading of the cargo of the ship, within four leagues of our coast, it was a violation of our laws, and without the protection of her license. The evidence certainly does not lay a sufficient foundation for the Court to exonerate her from this imputation. There is a possibility of her innocence ; but the conduct of her master has been \*so extraor- \*262 dinary, and there is such a cloud of suspicion hanging over her, that no Court, proceeding with proper caution, can pronounce her to be guiltless. Without, therefore, adverting to the evidence as to the second count, on which I do not feel myself called to pronounce, my judgment is, that the Abby is forfeited for having

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The Abby.

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been engaged in an illegal traffic. On the facts, therefore, the decree of the District Court ought to be affirmed.

It is, however, objected, that the seizure in this case was actually made in the port of Portland, within the judicial cognizance of the District Court of Maine, and therefore, that the jurisdiction of the District Court of Massachusetts has not attached. I accede to the position, that the Court below had no cognizance of the cause, if the seizure, on which this libel is founded, was in the port of Portland ; for the Judicial Act of 1789, ch. 20, § 9, gives exclusive jurisdiction of all seizures made within any district to the District Court of such district. Concurrent jurisdiction exists in the District Courts of other districts, only where the seizure is on the high seas. But the objection here fails in point of fact. The seizure was first made about five miles off Cape Elizabeth, and was therefore on the high seas ; since all waters below the line of low-water mark on the sea coast are comprehended within that description ; and when the tide flows, the waters to high-water mark also are properly the high seas.<sup>1</sup> This is not denied by the claimant's counsel ; but it is said, that the seizure so made was formally abandoned, and a new seizure afterwards was made in Portland harbour. It is true, that the Abby after the seizure was permitted to go into Portland harbour, navigated by her own crew, the seizor's crew having been removed by the commander of the revenue cutter. But under \*363 what circumstances was this done ? There were \*appearances of an approaching storm ; and it was thought best by all parties, that the Abby should proceed to Portland harbour for shelter. The revenue cutter was not manned with an extraordinary complement of men. The master of the Abby voluntarily offered to conduct his vessel into Portland, without the presence of the seizor's crew ; and agreed there to redeliver her again to the seizor. This offer was accepted ; and the seizor's crew was upon the

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<sup>1</sup> *Sir H. Constable's case*, 5 Co. R. 107.

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The Abby.

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faith of it withdrawn. Upon her arrival at Portland, the Abby was faithfully delivered to the seizer without any delay or objection. I agree, that if there was an absolute abandonment of the seizure, a new seizure might have become necessary. But to constitute such an abandonment, there must be an intention coupled with an unequivocal act of dereliction. There is no pretence of such an intention; and looking to all the circumstances, there is as little pretence to suggest, that there was any such act. It is like the case of a capture as prize. It is not necessary, that a prize crew should be put on board to navigate the ship; the capture still continues complete, although the ship be navigated by her original crew, if there be an agreement to this effect, between the captors and the captured. It is quite another question, whether the original crew are bound to navigate her; but if they do consent, they are not at liberty afterwards to change the character of that Act, by setting it up as an abandonment of the rights of prize. The evidence of an abandonment of a seizure ought to be extremely strong to justify a Court in coming to such a conclusion. The presumption of such an intention is here repelled by the whole current of the testimony, as well as by the subsequent conduct of the seizing officer in repossessing himself of the Abby, and immediately instituting proceedings to ascertain and enforce the forfeiture.

The question has been thus considered by the consent of the parties, as if the question of jurisdiction were open \*upon the \*364 record. But in strictness, no such question is properly before the Court. If the party meant to except to the jurisdiction, he should have filed a declinatory allegation, in the nature of a plea to the jurisdiction. But here he has applied to the Court for, and obtained a delivery of, the property on bail; and the very stipulation of bail admits the jurisdiction of the Court. He has regularly filed a plea, claiming the property and traversing the allegations of forfeiture in the libel. Upon the pleadings in the

cause, the only question put in issue by the parties is forfeiture or not ; and the Court cannot travel beyond the defence asserted by the claimants. The question then of jurisdiction, not having been put in issue, cannot be properly in proof before the Court ; for the proof must be according to the allegations ; and no party can be called upon to establish, what is not drawn into controversy by the allegations.

Nor is this a mere matter of form ; but a substantial and important doctrine, regulating the essential rights of parties. If a plea to the jurisdiction had been taken in the Court below, no delivery on bail would have taken place, until the jurisdiction had been affirmatively settled. If the Court below felt itself ousted of jurisdiction, it would have remitted the cause and the property to the District Court of Maine. But after a delivery on bail, how is that possible ? The party gets possession of the property, without a trial, from the possession of a tribunal, whose jurisdiction he admits as competent to bail the property ; and as soon as it is withdrawn from the grasp of the Court, denies its power to institute any inquiry into the question of forfeiture. It cannot be admitted, that any party can first affirm the jurisdiction, by taking the property on bail, and then turn round and deny the same jurisdiction, when the Court can no longer administer effectual relief to the interests of other persons. The party is estopped by his own acts from such a proceeding. A plea to the merits is \*365 an admission, that \* the jurisdiction of the Court is well founded ; and a decree on those merits cannot afterwards be arrested, unless the defect of jurisdiction be apparent on the face of the record. Whatever is not controverted is presumed to be admitted.

*Condemned.*

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The Mary.

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## THE MARY, THOMAS MASTER.

If a person has in the Acts of Court asserted himself as part owner of a privateer, he will be responsible as such owner for damages assessed against such privateer, although his name be not in the ship's papers.

THIS cause having been decided in favor of the privateer Cadet against the claim of the privateer Paul Jones the damages were assessed against the owners of the latter, under the decree of the Supreme Court, which is reported at large in 2 Wheaton's Rep. 123. At May Term, 1817, of the Circuit Court, process issued against the owners, who were named in the commission and ship's papers, for the damages so assessed; but the process was returned unsatisfied. And at October Term, 1817, the plaintiffs filed a petition praying for a monition against Messrs. Bryant and Sturgis as joint owners, to compel them to pay the damages. It appeared of record in the proceedings, that at May Term, 1816, Messrs. Bryant and Sturgis filed a petition in the Circuit Court, alleging that the Mary had been condemned in the District Court of Maine, "to them the petitioners and others, owners of the private armed vessel Paul Jones as captors;" that the same decree had been affirmed in the Circuit Court "adjudging the said vessel and cargo to the petitioners and others, said owners, as captors;" and praying a delivery of the proceeds to them on bail pending the appeal to the Supreme Court. This petition was resisted on the part of the owners and officers of \*the private armed vessel Cadet, and finally an agreement was entered into by the parties, at the same term, as follows. "In the case of the application of Messrs. Bryant and Sturgis, in behalf of themselves and others, owners of the private armed vessel Paul Jones, &c. praying that the proceeds of the prize vessel might be paid out to them, on giving bonds, &c. It is agreed by the parties in interest, that one half of the said proceeds be paid out

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The Mary.

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as prayed for and one half thereof be in like manner paid out to the adverse claimants, [the owners of the Cadet,] each giving therefor such security as the other shall approve, to be approved by the judges at chambers, or in court." The proceeds were paid out accordingly, and the proper approved security given, and Messrs. Bryant and Sturgis received one moiety thereof.

A monition was granted by the Court against Messrs. Bryant and Sturgis, to appear and show cause, why the damages should not be paid by them. At the return of the monition they accordingly appeared, and filed a special answer, and defensive allegation on oath. It stated that at the time of the equipment and commissioning of the Paul Jones, she was armed by one Samuel Hubbard, who gave bonds at the Custom House on the outfit for the cruise ; that after the equipment of the Paul Jones, one Joshua Hilton representing himself a part owner, and being indebted to the respondents, proposed to give them one sixteenth part of the Paul Jones for five hundred dollars, in satisfaction of their demand, to which the respondents assented ; that no written conveyance has been since made, and no money or settlement with Hilton upon that contract, although it was, and is, the expectation of the respondents to allow the said sum in account with Hilton on settlement ; that the said Hubbard was constituted agent for the privateer, and that the proceeds have been paid into his hands, and are received by him for payment of the sums  
\*367 due in this case ; \* and they, therefore, prayed that a monition might issue to the said Hubbard, and his sureties, on the Custom-House bond, and to the other owners, to pay the amount before the respondents should be made liable ; and they submitted to the Court the question of their liability.

The Court directed a monition against the sureties in the said bond. And the question as to the liability of Messrs. Bryant and Sturgis as owners, was several times spoken to by *Sprague* for the owners of the Cadet, and by *L. Shaw* for the respond-



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The Mary.

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ents ; and at May Term, 1818, the following opinion was delivered.

STORY J. Whatever might have been my opinion upon the special facts stated in the answer, as to which I affirm and deny nothing, I am very clear, that the proceedings of Messrs. Bryant and Sturgis, in the acts of court, in which they assert themselves to be owners, and claim a delivery of the prize proceeds on bail in that character, are conclusive upon them, and they cannot now be permitted to deny, that they are owners at least to the extent of being responsible for the damages in this case. This case is much stronger than that of the *Nostra Signora de los Dolores*,<sup>1</sup> where Sir William Scott held a person liable, as owner, for damages, although his name was not in the ship's papers. There the party had only asserted himself owner by acts in *pais* ; here the respondents assert it by acts of record, and must be estopped by such acts. The prize proceeds were delivered to them on bail, in virtue of their character as owners. How can the Court now consistently permit them to shake off the character they have voluntarily assumed ? There must then be a decree against them for payment of the damages ; but we will do all we can to relieve them, by calling, with the consent of the \* plaintiffs, in the first instance, upon the original owner and \*368 his sureties, and suspend process to compel payment, until we see if that proceeding be effectual.†

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<sup>1</sup> 1 Dodson R. 290.

† The money was afterwards paid by the sureties of the original owner.

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Russell v. Perkins.

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## NATHANIEL RUSSELL v. JAMES AND T. H. PERKINS.

A guaranty of the notes of A cannot be applied as a guaranty of the notes of A and B.

Upon a guaranty to the plaintiff of all notes of A, which he should endorse, to the amount of \$10,000, the plaintiff endorsed notes of A to the stipulated amount at several banks; and when the notes became due, they were taken up at the banks, and new notes, signed by A and B his partner, and endorsed, were received by the banks in their stead. It was held, that the guaranty did not apply to the new notes; and that by such substitution the old notes were extinguished.

Of the effect of laches in giving notice under a guaranty.

**ASSUMPSIT** on a letter of guaranty, addressed by the defendants to the plaintiff, at Charleston, S. C., as follows:

*Boston, December 9, 1802.*

NATHANIEL RUSSELL, Esq.

Dear Sir, — Should our friend, Mr. Josiah Sturgis, require your support in his negotiations at the banks, we hereby agree to guarantee any notes you may endorse for him to the amount of ten thousand dollars. And we shall feel ourselves obliged by any kindness or favors you may think proper to afford him. We are, &c.

The cause came on to be tried upon the plea of the general issue; and upon the Statute of Limitations pleaded by the defendants. At the trial it appeared that Mr. Sturgis was the brother-in-law of the defendants, and that at the time of the \*369 writing the letter of guaranty, was in insolvent \* circumstances; but contemplated renewing business at Charleston, S. C. The letter of guaranty was delivered to the plaintiff, who, upon the re-commencement of business by Sturgis, upon the faith of the letter of guaranty, endorsed notes of Sturgis at the banks at Charleston from time to time during the year 1803, for sums exceeding in the whole, ten thousand dollars. In January, 1804,

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Russell v. Perkins.

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Sturgis formed a partnership with a Mr. Lovell, under the firm of Sturgis and Lovell, which partnership was well known to the defendants, and continued until dissolved on their failure in August, 1816. After the formation of the partnership, the various notes of Sturgis, endorsed by the plaintiff, were taken up at the several banks, as they became due, and new notes in the partnership name, endorsed by the plaintiff, were given to the same banks by way of renewal, in lieu of the old notes. And these last notes were renewed from time to time in the same manner, until the dissolution of the partnership in 1816. After the dissolution of the partnership, Sturgis made the three several notes, on which the suit was brought, viz. one dated 5th October, 1816, for \$ 2565, endorsed by the plaintiff, payable at the Union Bank ; a second, dated the 7th of October, 1816, for \$ 5900, endorsed by the plaintiff, payable at the State Bank of South Carolina ; and a third, dated 31st December, 1816, for \$ 1535, endorsed by the plaintiff, payable at the South Carolina Bank. These notes were paid by the plaintiff as they became due ; and they were made for the purpose of taking up notes for lesser sums, then due to the said banks, on the notes of Sturgis and Lovell, endorsed by the plaintiff, which had been given in the manner before stated, in lieu of the notes of Sturgis, endorsed by the plaintiff before the partnership. After payment of these three notes, the plaintiff in March, and again in June, 1816, gave notice thereof to the defendants, and claimed an indemnity \* for the amount under their letter of guaranty. The defendants \*370 never returned any answer. The plaintiff never at any prior time gave any notice to the defendants, that he had made any advances under the guaranty ; or that he had endorsed the partnership notes of Sturgis and Lovell, under the faith of the guaranty. But there was some evidence in the case, from which, if believed, it might be inferred, that the defendants as early as 1806 knew, that the plaintiff did continue to endorse the papers

of the firm, and that in the opinion of the firm of Sturgis and Lovell it was done under the guaranty.

The cause was argued by *Hubbard* and *Webster* for the plaintiff, and by *Gallison* and *Prescott* for the defendants.

STORY J. I am of opinion, that the plaintiff is not entitled to recover. Independently of every other objection, it is decisive against the plaintiff, that the case is not brought within the terms of the guaranty. The guaranty cannot in reason be construed beyond the plain and obvious import of its language. The letter imports, that the defendants will guaranty any notes endorsed by the plaintiff for Mr. Sturgis to the amount of ten thousand dollars. It does not cover any notes endorsed for the firm of Sturgis and Lovell. Nothing can be clearer, than that a guaranty of the notes of A cannot be applied to the notes of A and B. It is wholly unimportant to the defendants, whether the notes would have been more or less safe under such circumstances. They have a right to stand upon the terms of their contract, and declare, *non in hæc fœdera venimus*. The original notes of Sturgis, endorsed by the plaintiff under the guaranty in 1803, were taken up and extinguished by the new partnership notes, endorsed by the plaintiff. When once extinguished, the title under the guaranty was gone ; and a continuing liability could not be afterwards \* created without the express or implied consent of the defendants. The notes, on which the present action is brought, were indeed made by Sturgis, and endorsed and paid by the plaintiff. But there is no pretence, that they were made upon the faith of the guaranty. Supposing they were now for the first time made after so great a lapse of time, upon a new consideration, the defendants would not be liable on their guaranty ; for the guaranty could not be applied to endorsements made for the first time at such a distance of time. Much

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 Rowe *et al.* v. Brig —.
 

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less could these notes be sustained under the guaranty, when they were made for the express purpose of changing partnership transactions into individual negotiations, so as to shape a case within the terms of the guaranty. If, indeed, these notes could be referred back (as they certainly cannot be) to the original transactions in 1803, the facts would be equally fatal to the plaintiff, for he would be guilty of gross laches in not giving notice of the endorsements to the defendants during the space of twelve years; and in giving credit to the firm during all that time, without any communication with the defendants, on account of debts incurred under the guaranty. It is not, however, necessary to dwell on this view of the cause, because it is plain, that the original notes of Sturgis in 1803, to which alone the guaranty ever attached, were duly paid and extinguished, as they became due, at the several banks, by the substitution of new notes in the partnership name, which the defendants never undertook to guaranty.

*Verdict for the defendants.*

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\* ISAAC F. ROWE AND OTHERS

\*372

v.

THE BRIG ——— AND CARGO.

Of salvage in cases of derelict. In general a moiety is the rule of salvage in cases of derelict; but it is a flexible rule, yielding to circumstances.

**LIBEL** for salvage. The material facts were as follows. On the 28th day of October, 1817, the schooner Hope, owned by the libellants, sailed from Boston on a fishing voyage, with a crew of four men, commanded by Henry Geyer. After being out a couple of days, and during a heavy squall, they discovered a vessel at about four miles' distance from them, apparently in

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Rowe et al. v. Brig —.

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distress. On running down to her they found her to be a brig without any person on board, and in a very shattered condition. They at first attempted to take out her lading, and put it on board their schooner; but the weather being so tempestuous as to render this impracticable, it was determined to bring her if possible into Boston. For this purpose the captain and two of the crew went on board of her, and the schooner was ordered to keep close company. After three days of great exertion and imminent danger, during all of which time they were exposed to a very severe storm and heavy gales of wind, and in consequence thereof separated from their schooner, they succeeded in bringing the brig into Boston harbour, and running her on shore at Thompson's Island, from whence they afterwards got her off, brought her up to Boston, and there libelled her for salvage. A claim was interposed by the Spanish Consul for the property, as belonging to certain Spanish subjects unknown. The brig and cargo were appraised at the gross value of 26,201 dollars, and at the net value of 20,951 dollars; and upon the hearing, the District Court decreed as salvage to the libellants the sum of 3000 dollars. From this decree the libellants appealed to the Circuit Court.

- \*373 \* The cause was argued by *Prescott* and *William Sullivan* for the appellants, and by *G. Blake* for the appellee. The argument principally turned on the proper amount to be decreed as salvage. And to this point the following cases were cited by the counsel for the appellants and appellee.<sup>1</sup>

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<sup>1</sup> For the appellants: — *The Amelia*, 4 Dall. R. 34. *The Priscilla*, Bee. R. 1. *The St. Petre*, Ibid. 82. *The Anthonio*, Ibid. 178. *The Mary Ford*, 3 Dall. R. 188. *The Adventure*, 8 Cranch R. 226. *The Blaireau*, 2 Cranch R. 240. *The Favorite*, 4 Cranch R. 346. *Beawes*, 158, 162. *The Aquila*, 1 Rob. R. 37. *The Jonge Bastiaan*, 5 Rob. R. 287. *The Lord Nelson*, Edw. R. 79. *L'Esperance*, 1 Dodson R. 49. *The Blendenhall*, Ibid. 421. *Tyson v. 800 Barrels of Flour*, 1 Gall. R.

STORY J. There is no dispute in respect to the facts of this case; and upon these facts it is clearly a case of derelict in the sense of the maritime law. For to constitute a derelict in that law, it is sufficient, that the thing is found deserted or abandoned upon the seas, whether it arose from accident or necessity, or voluntary dereliction. Sir *William Scott* has declared, that a legal derelict is properly, where there has been an abandonment at sea by the master and crew without hope of recovery.<sup>1</sup> With the view, for which the words “without hope of recovery” are introduced, viz. to distinguish a temporary absence from a permanent abandonment, it might perhaps have been more accurate to have said, an abandonment without an intention of return; since the *spes recuperandi* might exist even though the abandonment were without such intention. In another case,<sup>2</sup> the same learned Judge seems to have entertained an opinion, that if a vessel be captured and afterwards abandoned by the enemy, it is not properly a case of \*derelict; because neither the owner, nor \*374 those who were in possession, as his agents, have committed any act of dereliction. So that, in this view, to constitute a derelict, there must be a voluntary abandonment by the master and crew. But this opinion, as I gather from later cases,<sup>3</sup> has been silently retracted; and certainly it is not recognised as the doctrine of this country. Sir *Leoline Jenkins*<sup>4</sup> has given a true definition

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133. *The Belle Creole*, Peter's R. 34. *The Cato*, Ibid. 48. *The Sloop Ann*, Ibid. 282. *The Cora*, Ibid. 361. *The Leander*, Bee. R. 260. *The Jefferson*, 1 Johns. R. 34.

For the appellee. *The Favorite*, 4 Cranch R. 346. *The Blaireau*, 2 Cranch R. 240. *The Mary Ford*, 3 Dall. R. 188. 19 Viner Abridg. *Salvage* (A. 3). Molloy, B. 2, ch. 5, § 7.

<sup>1</sup> *The Aquila*, 1 Rob. R. 37.      <sup>2</sup> *The Jonge Johannes*, 4 Rob. R. 216.

<sup>3</sup> *The Lord Nelson*, Edw. R. 79. *The Blendenhall*, 1 Dodson's R. 414.

<sup>4</sup> 1 Sir Leo. Jenk. Works, 89.

in its most broad and accurate sense, when he says derelicts are "boats or other vessels forsaken, or found on the seas without any person in them. It is true, that the civil law attached a very different sense to the term; for a thing was not a derelict in that law, unless the owner voluntarily abandoned it without any further claim of property in it. *Pro derelicto autem habetur quod dominus eâ mente abjecerit, ut id in numero rerum suarum esse nolit*; <sup>1</sup> and therefore a thing cast overboard in a storm to lighten a vessel was not esteemed a derelict.†

The only question for the consideration of the Court is, what amount of salvage ought, under the circumstances of this case, to be allowed to the salvors. This is said, and properly said, to rest in the discretion of the Court; a discretion, however, which is not to be exercised at the mere arbitrary will of the Judge, but as far as possible to be governed by principles of law and sound reason. I confess that I never feel more distressed, than when called upon to exercise a general and unlimited discretion. In cases of this sort, it can hardly be presumed, that different Judges, even when possessing equally enlightened and sound judgments, \*375 \* would form precisely the same estimate. And yet it is very desirable to discourage appeals upon slight grounds, or with a view to take the chances of a different opinion. In deciding, therefore, upon the decrees of the District Court in cases of salvage, my inquiry never has been so much, whether the allowance was the same, as I should originally have made, as whether, under all the circumstances of the case, justice and sound policy clearly indicated a different measure. And, distrusting my own

<sup>1</sup> Inst. Lib. 2, tit. 1, § 46.

† Quod ex naufragio expulsum est usucapi non potest, quoniam non est in derelicto sed in deperdito, 3 Pothier. Pand. Lib. 41, tit. 7, [8.] § 2, p. 155, and 3 Poth. Pand. Lib. 41, tit. 1, p. 119. See also Loccenius de Jure Marit. Lib. 1, ch. 7, § 6. 1 Emerigon, ch. 12, § 40, p. 611.



judgment, I have on all occasions sought to apply the spirit of those decisions, which a higher tribunal has recognised and enforced, and to follow in the path of authority, rather than venture upon new and untried courses of my own.

In cases of salvage, the measure of reward has never been adjusted by a mere estimate of the labor and services performed by the salvors. These, to be sure, are very important ingredients; and are greatly enhanced in value, when they have been accompanied by personal peril and gallantry, by prompt and hardy enterprise, and by severe and long-continued exposure to the inclemencies of the winds and waves. But an enlarged policy, looking to the safety and interest of the commercial world, decrees a liberal recompense, with a view to stimulate ambition, by holding out what may be deemed an honorable reward. Nor should it be forgotten, that the same policy has a strong tendency to discourage petty plunderage and concealment of the property saved; and to induce salvors to bring it in good faith before judicial tribunals, and rely upon their justice for ample remuneration.

In most cases of salvage, it is extremely difficult to lay down a satisfactory rule to guide the judgment. But where a particular proportion has been frequently applied in a class of cases, I do not think, that slight, or even considerable distinctions in the circumstances ought to induce a Court of law to depart from that proportion. It is better \*to adhere to a rule, which may \*376 operate somewhat unequally, than to leave every thing afloat in mere undirected discretion.

In cases of derelict, it was the ancient rule of the Admiralty to give the salvors a moiety of the property saved. This is very distinctly articulated in the Black Book of the Admiralty, as a known and settled rule of division.<sup>1</sup> And it continued in prac-

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<sup>1</sup> *The Aquila*, 1 Rob. R. 37. Roughton, Art. 6, 47.

tice, at least to the close of the reign of Charles the 2d; for there is an express decree, in 1683, recognising its existence.<sup>1</sup> I incline to believe that it was originally borrowed from the civil law, by analogy to the case of treasure found in some public place, in which case, by a decree of the emperor Adrian, one moiety was given to the finder and one moiety to the public;<sup>2</sup> which was precisely the mode of distribution in the Admiralty, where no owner appeared; for then one moiety was under the grant of the crown considered a droit of the Admiralty. Be this as it may, Sir William Scott considers, that the rule is become obsolete, and that *de jure* salvors are not now entitled to claim a moiety.<sup>3</sup> Yet it is very apparent, that his judgment is now in no small degree influenced by the rule in all cases, to which it was originally applicable. In *The Fortuna*,<sup>4</sup> which was the case of a vessel found derelict on the British coast, and, in many respects, resembled the case now in judgment, he allowed a salvage of two fifths, and added, "If there had been any considerable danger attending the act of salvage, I should have given, what the Court is in the habit of giving in cases of derelict, an entire moiety." In a still more recent case he observed, that "in cases of derelict the Court not unfrequently gives one half of the  
 \*377 \* property saved; and this, perhaps, was done in all cases of the same kind, according to the old law.<sup>5</sup> In that case however (which was a derelict) the property being of the value of 72,000*l*. he gave the salvage of one-tenth only, a sum which, under the circumstances, with some difficulty approves itself to my judgment. In all other cases of derelict, which have come before him (and there have been several) he has allowed either a

<sup>1</sup> *The Aquila*, 1 Rob. R. 37.

<sup>2</sup> Inst. Lib. 2, tit. 1, § 69. 3 Pothier, Pandects, Lib. 41, tit. 1, p. 101.

<sup>3</sup> *The Aquila*, 1 Rob. R. 37.

<sup>4</sup> 4 Rob. R. 193.

<sup>5</sup> *The Blendenhall*, 1 Dodson's R. 414.

moiety, or two-fifths of the property.<sup>1</sup> And in similar cases before the Supreme Court, proportions as favorable to the salvors have been uniformly adopted.<sup>2</sup> The ordinance of France gives, in all cases, one third of the gross value † of derelicts; and the same rule (as Loccenius informs us) is generally adopted by Sweden and the other northern States.<sup>3</sup> Nor have I met with a single instance, in which a lower rate of salvage has been established by the municipal law of any modern maritime nation. And from this it may, perhaps, be gathered, as the general sense of the maritime world, that the rate of salvage on derelicts should not in ordinary cases range below a third, nor above a moiety, of the value of the property.

At the argument I intimated an opinion, that in cases of derelict the old rule ought still to be considered as a subsisting, but flexible rule; and that *primâ facie* the salvors were entitled to a moiety; and that it was incumbent upon the claimant to establish, that under the special circumstances of the case a different measure ought to be applied. And this opinion was given with reference to the fact, that \* a moiety still continues the favorite #378 proportion of judicial tribunals, if we can trust to the accuracy of reports. Upon subsequent reflection, I feel not the slightest inclination to change that opinion; and as a limit upon judicial discretion in ordinary cases, I think it a safe and salutary rule. When I say, however, that the rule is flexible, I do not mean, that it bends to every slight change of circumstances. But cases

<sup>1</sup> *The Aquila*, 1 Rob. R. 37. *The Jonge Bastiaan*, 5 Rob. R. 322. *The Lord Nelson*, Edward's R. 79. *The Maria*, Edw. R. 175. *L'Esperance*, 1 Dodson's R. 49.

<sup>2</sup> *The Mary Ford*, 3 Dall. R. 188. *The Blaireau*, 2 Cranch R. 240. *The Adventure*, 8 Cranch R. 226.

† This is probably, in most cases, about two fifths of the net value.

<sup>3</sup> 2 Valin, Com. 635. Loccenius de Jure Mar. Lib. 1, ch. 7, § 10,

may occur of such extraordinary peril and difficulty, of such exalted virtue and enterprise, that a moiety, even of a very valuable property, might be too small a proportion. And on the other hand there may be cases, where the service is attended with so little difficulty and peril, that it would entitle the parties to little more than a *quantum meruit* for work and labor. These are exceptions (and others might be stated) to the operation of the rule which may perfectly consist with its general obligatory force.

It is not necessary, however, to proceed in the present case upon this ground, reasonable as it seems to me, because the facts establish a most meritorious claim, and a most perilous adventure on the part of the salvors. It seems almost certain, that, but for them, the brig and cargo would, in the intervening storm, have been wholly lost; and if the evidence is believed, they were actually saved at the most imminent personal peril. Under such circumstances, I cannot but entertain the opinion, that the salvors are entitled to a very liberal recompense. I cannot sit here for the purpose of weighing in minute scales the exact quantity of labor and toil, and of anxiety and peril, and thus break the case into fragments, to compare it with the fragments of other cases. Looking to all the circumstances, it seems a case of real merit; and if so, it is the duty of courts of justice to deal out a liberal allowance.

I do not find, that in the District Court a different view was  
\*379 entertained of the evidence. Indeed it is so uniform \* in its tenor, that no room seemed left for judicial doubts. But the learned judge thought himself bound to discourage a practice, which seems of late unfortunately to have crept in, for persons pretending to make, or actually making, captures under the flag of the South American patriots (as they are usually termed) to endeavour to procure an admission of their prizes into our ports; and for this purpose to hover on our coasts, and make use of fraudulent pretences and disguises, by which the revenue laws are some-

times violated, and the public peace endangered. The learned Judge, therefore, thought it his duty to diminish the inducements of our citizens to join in these illegal enterprises, by awarding a less sum for salvage of such prizes, than the circumstances of the case might otherwise justify. I have great deference for the opinion here expressed, and feel a solicitude equal to that, which has always so laudably distinguished my brother, to prevent the judicial tribunals of the United States from becoming auxiliaries in these illicit purposes. In a proper case I would go a great way to enforce the due observance of our neutral rights and duties; and where they were clearly violated, I should deem it no strain of the law to declare the right to salvage forfeited. But my difficulty lies in applying the doctrine to the present case. There is not a shadow of evidence, that this vessel and cargo were brought into port under any collusive agreement with the supposed captors, or that her distress and abandonment was merely colorable. Nor is there any allegation to this effect set up in the claim of the Spanish consul. There is a considerable probability, that the vessel and cargo are Spanish; and that they were captured by persons acting under the patriot flag; and that they were deserted by the captors on our coast. But even these facts are not established; for no papers or persons were found on board, so that there is a total absence of the usual proofs. And admitting, that these facts were ever so well \* established, still \*380 if the salvors have conducted themselves with good faith, and have not been parties or privies with the captors in any fraudulent or collusive purpose, it is not easy to perceive, why they should be visited with what is in effect the punishment of guilt. The law gives them the full benefit of their title to salvage, unless they have forfeited it by their own misconduct. No such misconduct is shown here; and indeed it is expressly negatived on oath by every person claiming to be a salvor. It seems to me, therefore, that the Court is bound to deal with the case, as with

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every other of derelict ; and that if public policy requires a different rule of salvage for Spanish vessels from that, which now governs us, it ought to be furnished by the Legislature. Nor can it be considered as a hardship upon the Spanish owner, that he receives his property again, loaded with the expense of salvage, when it would have otherwise been a total loss to him ; and when he receives it upon as favorable terms as could be claimed by our own citizens. In a case of collusion, established by direct proof or strong presumption, I should have little difficulty in applying the penalty of forfeiture against the claim of asserted salvors.

With whatever reluctance, I feel myself constrained to reverse the decree of the District Court ; and shall decree to the libellants a moiety of the net value of the brig and cargo, after deducting all duties, charges, and expenses, including therein the costs of Court, and the legal expenses of both parties. I shall farther order the cargo to be sold at public auction, and the proceeds brought into Court for distribution. The vessel is to be taken, in estimating the salvage, at her appraised value, unless the claimant shall elect to have her sold, in which case she is to be sold in the same manner as the cargo.

*Decree reversed.*

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\* MARY HARVEY v. JOHN RICHARDS.

A Court of Equity has jurisdiction to decree an account and distribution, according to the *lex domicilii*, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here.

But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case.

**T**HIS was a bill in equity to compel the defendant, who was administrator with the will annexed of James Murray, late of Cal-

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cutta, in the province of Bengal, deceased, to a distribution of the undivided estate of the testator in this country, among the next of kin residing here. The executors appointed by the will of the testator, resided in Calcutta, and the defendant was appointed by them an administrator for the purpose of collecting the testator's effects here. The same parties had been heard in Court, at two former terms on other points.<sup>1</sup> The question that now came up was, whether the defendant should be ordered to distribute the effects in his hands among the next of kin in this country, or should send it to Calcutta to be distributed by the executors there.

*Aylwin*, for the plaintiff.

The first question is, whether this Court has authority to distribute the undivided surplus among the next of kin, according to the law of the testator's domicile? It is averred in the answer, "that this Court has no authority to distribute the undivided surplus, but it ought to be transmitted to Bengal." This principle we wholly deny. The law of the testator's domicile must be the rule; and it will be our duty to show, that this Court can apply that rule. To decide this question, it may be useful to consider, whether \* this is substantially an original administration, or merely auxil- \*382 iary to the principal one of the executors in India. If it be the former, there can be little doubt in relation to the authority of the Court.

As to the facts, it is assumed, that there are no debts abroad, nor any specific trusts under the will to be executed. The testator by his will evidently intended to die intestate, as it regards this property. He says, the property now going to America, I do not consider as belonging to any person." And he then constitutes a mercantile partnership to be his executors. The next

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<sup>1</sup> Vide 2 Gallis. R. 216 and 557.

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of kin are citizens of the United States. Now, from the decisions in England it is evident, that the appointment of an executor in India, is considered as merely constituting him an agent. In *Chetham v. Audley*,<sup>1</sup> the Lord Chancellor says, "I think the appointment of an executor in India, no legacy being given to him, is the appointment of an agent for the management of the estate. They give him the character of executor." The same doctrine is affirmed in *De Mazar v. Pybus*,<sup>2</sup> as it regards the appointment of a partnership to be executors. The place, where the will was made and proved, does not necessarily draw to the courts of that place the exclusive administration of the estate. In both these cases, although the wills were proved in India, the Court of Chancery in England undertook to direct the settlement of the estates; and upon the principle of these cases we may safely rely, that this is, in reality, an original administration. But whether so or not, still on the grounds of public law and universal justice the complaint is well founded in asking relief from this Court. A Court of Chancery being one of general jurisdiction, appears to be peculiarly fitted for the administration of foreign laws, when they affect property within its jurisdiction.

\*383 \*It is a remark of Lord *Kaimes*,<sup>3</sup> that "it is of great importance to every nation, that justice have a free course everywhere; and to this end it is necessary, that in every country there be an extraordinary jurisdiction for foreign matters, as far as justice is concerned." And under this title of "foreign matters," he discusses the question as to the distribution of moveables, and lays down the position, that every question in relation to them must be determined by the Judge of the place; but it must be according to the law, which governed the owner of them.

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<sup>1</sup> 4 Vesey, Jr. R. 72.

<sup>2</sup> Ibid. 648.

<sup>3</sup> Prin. Equity, vol. 2, p. 326, p. 312-315, p. 318; vol. 2, p. 336, B. III. ch. 8, to 338, 339-340.



Lord *Hardwicke*<sup>1</sup> asserts, that though foreigners are subject to the authority of the Court of Chancery only while in England, yet their property in England is under its control.<sup>2</sup>

And Lord *Ellenborough* states, in *Potter v. Brown*,<sup>3</sup> "that it is every day's experience to recognise the laws of foreign countries as binding on personal property, as in the succession to personal property by will or intestacy of the subjects of foreign countries." In conformity with this rule, a variety of decisions have taken place in Scotland and England.

*Bruce v. Bruce*,<sup>4</sup> is a case of distribution by the Courts of Scotland, according to the law of England.

*Balfour v. Scott*,<sup>5</sup> was a decree of a Scotch Court for distribution according to the law of England of personal estate in England; and it was affirmed in Dom. Proc. as to distribution.

*Hog v. Lashley*,<sup>6</sup> was the case of a Scotchman making his will in England, which was there proved; distribution was according to the law of Scotland.

\* *Kilpatrick v. Kilpatrick*; <sup>7</sup> distribution by Lord *Kenyon* \*384 (Master of the Rolls) according to the law of Scotland of a legacy given by an Englishman to a Scotchman, which had not been received in the life-time of the latter.

*Drummond v. Drummond*<sup>8</sup> is also a case, where the Scotch Court decided on the distribution of property by the law of England, where the administration was originally granted in England.

In *Bempde v. Johnstone* <sup>9</sup> (the Marquis of Annandale's case),

<sup>1</sup> 1 Atk. R. 19.

<sup>2</sup> Cooper's Equity Pleading, pp. 123, 124.

<sup>3</sup> 5 East R. 124.

<sup>4</sup> 2 Bos. & Pull. R. 229, in notes to *Marsh v. Hutchinson*.

<sup>5</sup> 6 Bro. Parl. Cas. 550, Statute of Distrib. 1793.

<sup>6</sup> Ibid. 577, Stat. Distrib. 1798.

<sup>7</sup> Ibid. 584, 1781.

<sup>8</sup> Ibid. 601, 1799.

<sup>9</sup> 3 Vesey, Jr. R. 198, 1796.

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one of the bills filed was by Lady Graham for a distribution according to the Scotch law. The Lord Chancellor heard the arguments on the question of domicile, but finding it fixed in England, her bill was dismissed; and a decree according to the prayer of the other.

*Somerville v. Somerville*,<sup>1</sup> is a case of distribution by the Court of Chancery, according to the Scotch law, "the distribution arising from the place, where the property is situated."

From what may be gathered in the case of *Bowman v. Reeve*,<sup>2</sup> it appears that the testator, executor, and legatee were natives of Holland, and there settled; nevertheless a bill brought by the legatee against the executor (who had proved the will in England) for a recompense out of the personal estate in lieu of a specific legacy taken by a creditor in Holland, was sustained by the Lord Chancellor.

*Tourton v. Flower*,<sup>3</sup> was a case where Tourton, a banker at Paris, made his will, and gave a legacy to one Theluson, which had been set aside in France in favor of the next of kin. The French executor being dead, administration with the will annexed \*385 was granted by the \* Archbishop of Canterbury, and a bill was brought by the mothers, who had taken administration in France on the estate of the next of kin, against the administrator with the will annexed for a discovery and account. The defendants demurred, because there was no representative of the deceased Tourton in England, and the executor of the will might have left an executor.

The Lord Chancellor said, "The administration being taken out here, I will look upon the same to be good." But on demurrer *ore tenus*, because the mothers had not taken out administra-

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<sup>1</sup> 5 Vesey, Jr. R. 791.

<sup>2</sup> Finch's Prec. in Chancery, p. 577.

<sup>3</sup> 3 P. Wms. R. 369. 2 Eq. Cas. Ab. 78, pl. 9.

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tion to their sons in England, the bill was dismissed for want of proper parties.

These are the cases in England. In our own country similar decisions have taken place.

The case of *Desesbats v. Berquier*,<sup>1</sup> was that of a will executed according to the forms of the law, where the property was, but not in conformity with the law of the testator's domicile; and it was held by the Supreme Court of Pennsylvania to be invalid. And from that case it is to be inferred, that the administrator was directed to distribute the property according to the laws of the testator's domicile. However that may be, in the case cited in the note,<sup>2</sup> it was expressly decreed in Pennsylvania, that distribution should be made according to the law of Delaware.

In the case of the Selectmen of *Boston* against *Boylston*,<sup>3</sup> upon an interrogatory, as to what amount of property was received by the administrator in England, it was held, that he was not bound to answer. The counsel for the administrator in the course of their argument, to show the impropriety of accounting here, ask, how can our Judges, if they undertake to distribute here, know the laws of foreign countries? *Sedgwick* J. replies, the same difficulty must arise in every administration of a foreigner's estate originally taken here. The Judge must distribute according to the laws of the intestate's country.

Thus it appears, that Courts of justice will take cognizance of foreign laws affecting property within its jurisdiction, and deliver it to the party, to whom of right it appertains in cases of original administration.

Still it is supposed by some mystical virtue, belonging to the species of administration, under which the defendant in this case acts, that the application of a different rule is required. That

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<sup>1</sup> 1 Binney's R. 336.

<sup>2</sup> *Guier v. O'Daniel*, 1 Binn. R. 349,

<sup>3</sup> 2 Mass. Rep. 386.

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because this is an ancillary administration, the rights of the parties cannot be here established, and the Court must turn a deaf ear to their application. Although this administration in form is auxiliary to the principal one, yet in substance it is not. The property here is not required for the execution of any trust confided to the executor under the will; for the testator, in relation to this property, never reposed in him. Let it, however, be considered as an ancillary administration.

It is denied, that there is any general rule of public or municipal law, which requires that parties entitled to a foreigner's property, shall seek their rights only in the Courts of his domicile. From *Pipon v. Pipon*,<sup>1</sup> and a class of cases somewhat resembling it, it will no doubt be attempted to derive such a rule. The party, who applied for the distribution of the bond debt found in London, was not entitled by the law of the intestate's domicile, to a distributive share. That alone was sufficient to cause a dismissal of the bill. Lord *Hardwicke* declines going into the general question; but states his opinion, as it regards the rule of distribution, that the property follows the person, and becomes distributable according to the law or custom of the place, where the

\*387 intestate lived. This principle cannot be \*questioned. And his other remarks can only apply to a case, where the party having a right to the debt, ought not to call for a partial account, because the Statute requires a distribution of the whole residue, &c. He however says, that that case differs from where a specific part consists of chattels here in England. The whole argument turned on the point, whether the taking out of an administration in England altered the course of descent.<sup>2</sup>

The next case in order of time is *Thorne v. Watkins*.<sup>3</sup> Here

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<sup>1</sup> Amb. R. 25.

<sup>2</sup> See *Sill v. Worswick*, 1 Hen. Black. R. 690, Lord *Loughborough's* opinion.

<sup>3</sup> 2 Vesey R. 35.

the defendant was one of the executors of Richard Watkins, who resided in Scotland, died there, and left his estates among his nephews and nieces, of whom the defendant was one ; and he was also administrator, and one of the next of kin of William Watkins, who was entitled to a share in Richard's personal property, and who resided in England, and died there intestate. It was held, that William's share in his estate should be distributed according to the law of England. Lord *Hardwicke* puts a case, "If a man dies here, and administration is taken out here, where he has left personal estate, and he has debts abroad in France, Holland, or the plantations, which cannot be recovered abroad by virtue of the prerogative administration taken out here, the administrator must invest himself with some right from the proper Courts in that country, as administration must be from the governor of the plantation, if it arise there, which must be for form ; and it is generally granted on the foundation of the administration granted here, and then it must be distributed as here." The reason of the decision in *Pipon v. Pipon* was, that it called for a distribution of a part.

Neither of these cases, and they turn upon their particular circumstances, establish the pretended rule. Still less support \* will it derive from the case of *Burn v. Cole*.<sup>1</sup> The marginal \*368 note, in fact, states the reverse of this proposition. "One dies intestate having personal property in England and abroad ; distribution must be according to the law of that county, where he was resident when he died."

The case of *Jauncy v. Sealey*,<sup>2</sup> can have but little bearing in favor of the defendant. The plaintiff as administrator of T. S. deceased brought a bill for discovery. The defendant pleaded a *nuncupative* will made by the deceased according to the law of Naples, where he resided ; by which he was appointed executor,

<sup>1</sup> Amb. R. 415.<sup>2</sup> 1 Vern. R. 397.

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and denied that he left any estate but what was at Naples. The Court allowed the plea.

No English authorities, it is believed, can be adduced, which maintain this general proposition. But it will be said, that in this State decisions have taken place, which go to this length.

The cases of *Richards v. Dutch*,<sup>1</sup> and of *Dawes J. v. Boylston*,<sup>2</sup> will be pressed unquestionably on the Court, as decisive of this point.

The first case arose upon a motion for a new trial. There it was contended, that parol evidence ought not to have been admitted to give a construction to a clause in the will, under which the defendant claimed to hold the property; and if it had been properly admitted, still a legatee had no right to take a legacy without the assent of the executor. Upon the first ground, no lawyer could entertain a doubt; and on the second, as little: for no proposition is more clear, than that the bequest of a legacy  
\*389 transfers only an *inchoate* property to the legatee.<sup>3</sup> The \* decision of the Court is stated in a very few words, and what is added by the reporter is extra-judicial. "That legatees, who claim only from the bounty of the testator, must resort to the country of the testator, where the will was originally proved, and by the laws of which his effects are to be distributed, to obtain the bounty they claim." It does not appear however from the report, that this point was discussed. The case of *Dawes v. Boylston* certainly affirms the position; and although, under the particular circumstances of the case, it may have been correct, yet it is limited to a claim of residuary legatees, for those were the only persons calling for the aid of the Court; and what was the residuum could be better ascertained by the prerogative Court of Canterbury, than by our Courts. It is the decision of one Judge only,

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<sup>1</sup> 8 Mass. Rep. 514.

<sup>2</sup> 9 Mass. Rep. 355.

<sup>3</sup> Toller's Law of Executors, p. 306.

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and indeed a very respectable one ; but it is apprehended, that its force is much weakened by a careful examination of the Statute, and a subsequent decision of the whole Court of Massachusetts.

The Statute provides for filing and recording wills proved out of the government ; and enacts,<sup>1</sup> “ that the Judge may thereupon proceed to take bonds of the executor, or grant administration of the said testator’s estate lying in this government (with the will annexed) and settle the said estate in the same way and manner, as by law he may or can, upon the estates of testators, whose wills may have been duly proved before him.”

How this power, delegated to the Judge of Probate, was deemed inadequate for the purposes specified, it is difficult to imagine. To say, that these terms do not mean, what they evidently import, is rather to exercise the power of legislation, than of exposition. It is admitted by the Judge, that the probate bond given here might be enforced to procure an inventory and an account from the administrators. \* Still to what beneficial \*390 purpose could this tend? The administrator is resident here. The process of the Courts of England could not reach him ; and no bond is there required of an executor or administrator with the will annexed ; all that is exacted from him, is an oath to render an account. Even the bond of an administrator in England does not require him to do more ; it does not afford security for the payment of the distributive shares of the next of kin. If the principle of the decision of the Courts of Massachusetts be correct, the administrator might remain here with the property he has collected under the authority of our Courts, and set at defiance the claims and rights of our citizens, unless these citizens were creditors. Such consequences, without doubt, led that Court to qualify its decision, and to adjudge in the case of

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<sup>1</sup> Stat. of 1785, ch. 12, Vol. 1, 246.

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*Stevens v. Gaylord*,<sup>1</sup> that "if it appeared that the deceased had his home in Connecticut, they should cause the balance remaining in the hands of the administrator here to be distributed according to the laws of Connecticut, or transmitted there for distribution by their Courts."

The decision, therefore, leaves the question in this State still open ; and in every case, which may arise, the discretion of the Court in relation to its particular circumstances, will, as it undoubtedly ought, be freely exercised.

What principle of national justice can require our Courts to send its citizens into foreign countries, there to establish those rights, which may be here ascertained ? The same end can alone be effected abroad, which will be attained here. It is in effect to cause an useless expense and unnecessary delay, without any reasonable motive.<sup>2</sup>

Courts of Chancery do not adopt such narrow rules for their  
 \*391 government. In the language of the Lord Keeper,<sup>3</sup> \* "when it can determine the matter, it will not be an handmaid to other Courts, nor beget a suit to be ended elsewhere." And accordingly in the case of *Alexander v. Alexander*,<sup>4</sup> where a bill was brought against an executor to discover assets and for satisfaction ; and it was said for the defendant, that the plaintiff "ought not to have relief in Chancery, for he had a proper remedy at law."<sup>5</sup> But the Court being possessed of the cause, and the same being as proper for this Court as at law, it was decreed to avoid a circuitry of action, that the defendant should account and make the plaintiff satisfaction. If, then, in England, a party will not be turned out of a Court of Equity, because he can have redress in a Court of Law, is there not greater reason

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<sup>1</sup> 11 Mass. R. 264.

<sup>2</sup> 4 Mass. R. 324.

<sup>3</sup> 2 Chan. Cases, p. 200.

<sup>4</sup> 2 Chan. R. 37.

<sup>5</sup> 1 Vern. 429.



for not sending our own citizens to a foreign tribunal to vindicate their rights?

Further, the administrator in this case being the agent of the executor, he ought to be considered like his principal, the trustee of the next of kin. And upon chancery principles he need not be a party; for he who takes a trust estate, takes it subject to the trust, and is directly responsible to the *cestui que* trust.

A trustee to another's use made a letter of attorney to T. S.,<sup>1</sup> to manage and receive the rents and profits of the trust estate, who did so, and accounted to the trustee; and now being sued by *cestui que* trust, insisted that the trustee, and not he, was to account; and that he, having already accounted, might be quiet as to the plaintiff, but he was decreed to account to the plaintiff.

Where there was a demurrer to a bill for a legacy,<sup>2</sup> because one of the defendants was not the executor, the Court declared, that as he had got the estate, the demurrer should \*be overruled. \*392 The estate ought to be liable to legacies in whosoever hands it may be found.

Where there are two executors, and one is beyond the sea and the other in England, and a bill is brought against him that is in England, he having assets in his hands to answer the demand, it is held, that the other executor need not be made a party in such a case.<sup>3</sup>

The rule appears to be, that whosoever is in possession of the trust property, may be alone sued.

But where the creditor, legatee, or next of kin, seeks an account against the debtor of the deceased, it cannot be done without joining the legal representative, and charging collusion. The

<sup>1</sup> *Pollard v. Downes*, 2 Chan. Cases, 121. 1 Eq. Cases Abr. 6.

<sup>2</sup> *Nicholson v. Sherman*, 1 Chan. Cases, 57.

<sup>3</sup> 2 Eq. Cases Abr. 464.

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principle is fully stated by Lord *Hardwicke*, in *Newland v. Champion*.<sup>1</sup> The same is held in *Doran v. Simpson*.<sup>2</sup>

Thus it appears evident, that a Court of Chancery will dispose of property, without requiring all parties to be brought before them, who may be affected. When it is necessary, however, as in the case of *Wilde v. Holtzmeier*,<sup>3</sup> it will always afford time to parties abroad to come in and state their rights.

This bill has been pending several years ; the original executor has had an opportunity of becoming a party, if he chose. As he is out of the reach of the Court, we could not compel him to join. What will be the consequence, should the Court decree upon the principle contended for by the defendant ? It appears, that M'Clintoch is not in India. If the property be remitted there, we have no redress ; for the English law does not compel the executor to give security, and, according to the defendant's rule, we have no other forum than that of Bengal to resort to. If we run a race after him in England and Ireland, \*393 through \* the medium of the High Court of Chancery ; and if that Court should not adopt the rule contended for by the defendant ; and if M'Clintoch should not then be bankrupt, that Court will award to us nothing more than what we ask at the hands of this tribunal.

Whether then this administration be considered as an original one, or merely ancillary to that of the executor ; or whether this cause be regarded in relation to its own peculiar circumstances, we feel confident, that the plaintiff is entitled to a decree of the Court, as prayed for in the bill.

*Prescott* and *Hubbard* for the respondent. There are two questions which arise out of this case.

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<sup>1</sup> 1 Ves. R. 105.

<sup>2</sup> 4 Ves. jun. R. 665.

<sup>3</sup> 5 Ves. jun. R. 813.

1st. Is the residue of this estate to be distributed according to the law of the country, where the deceased was domiciled?

2dly. Is the administrator, appointed to collect the effects in this country, to remit the balance in his hands to the general administrator in India, or is he bound to make distribution of it here, if called upon so to do by persons rightfully entitled to it?

The first of these questions is already well settled by authorities.<sup>1</sup> And the counsel for the plaintiff appear willing to concede, that the law of the country, where the deceased was domiciled, is to regulate the distribution of his estate. We come then at once to the second question; and if upon this subject no precedents are to be found, the Court will adopt such a rule as will prove most generally convenient.

The interests of all who are in any way concerned in the estate of deceased persons, either as creditors, debtors, legatees or heirs, require, that such estate \* should be brought to a final \*394 settlement with as little delay, and as much after the manner, in which they would have been conducted by the deceased themselves, had they continued to live, as possible. This can only be effected by appointing some one to represent the deceased, to whom authority shall be given to arrange and settle the estate; to carry into effect the engagements the deceased was under at the time of his death; to compel others to the performance of their engagements towards him; and to distribute the remaining property among those, who have a legal title to it. We find accordingly, that in all civilized countries such persons are appointed. The representative enters into an obligation to the government under whose authority he acts, to execute the trust committed to him with fidelity and diligence; and the better to ensure this, he is called upon, at stated periods, to render an ac-

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<sup>1</sup> Hub. Prælect. V. 2, Lib. 1, tit. 3, § 18. Voet, Com. B. 38, tit. 17, § 34. *Bruce v. Bruce*, 2 Bos. & Pul. R. 223.

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count of his doings to the proper authority, and explain the situation of the estate. How can these duties be performed with more justice to the debtors, creditors, and legatees; more beneficially to the estate; or more conveniently to all parties interested; than by having the funds collected together in one place, and put into the hands and at the disposal of one person. There will then be one general account rendered of all the estate by the same person, and the balance be distributed according to the laws, which are to regulate the distribution, in that place, where those laws are best known and most easily applied. We contend, therefore, that the administration in this country is merely ancillary to that in India. The administrator there must either come to this country himself to collect the effects here, or some person must be employed to do this for him. This State, influenced by the comity, which exists between different countries on this subject, invests the person pointed out by the original administrator with authority to collect these effects; and, in return for this indulgence, requires that the debts due to its own

\*395 citizens shall be paid before these funds are \*withdrawn, either ratably or fully, according to the laws of that country. And it may be considered, perhaps, but reasonable, that as the administrator out of comity and favor is authorized to demand and collect the debts due from our own citizens to the estate, he should likewise be held to discharge out of the same fund such debts as are due from that estate to our citizens, although this may occasion some inconvenience and delay. But this reasoning can by no means apply to such persons, as claim from the bounty of the deceased merely; and the adoption of such a rule with regard to them, might, in some cases, become an insurmountable obstacle to the settlement of the estate. Supposing the estate of the deceased to be scattered in small portions throughout the whole of the United States, and the administrator in each State considered as an original and general administrator, liable to the

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demands of all the creditors, legatees, and heirs. What endless confusion would here be created ! What a variety of accounts ! What opportunities for fraud and embezzlement ! In such case the administrator abroad, instead of calling in to himself the accounts of these numerous administrators, and collecting together the property thus dispersed, would be first obliged to render an account to each of them ; and it would be necessary, too, that such an account should include in it the separate accounts of every other individual administrator ; add to this, each of these administrators is to make himself acquainted with the laws of the country, in which the deceased was domiciled, in relation to this subject, and to distribute the property in his hands as that law prescribes. It seems hardly possible to conceive, how the difficulties, which would inevitably arise in such a state of things, could be surmounted at all ; and if they could, it would certainly be at the expense of much time, and a great expenditure of the property. It seems to us but little consonant with justice, that such injury to the estate, \*and such difficulty to those \*396 who administer it, should be created by persons claiming merely from the bounty of the deceased.

But we do not press the adoption of the rule, which we think the most proper and beneficial one in this case, merely on the ground of its greater convenience. We contend that it is already expressly laid down by some authorities ; that it is fairly to be inferred from others ; and will not be found to be contradicted by any. Whereas the rule contended for by the plaintiff is in no instance clearly recognised.

In the cases cited by the plaintiff's counsel, where a surplus has been distributed, it will be found, that the general administrator was before the Court, and had submitted to the jurisdiction. The cases may be classed under two heads: 1st. Of applications to chancery 2dly. Of appeals to the House of Lords.

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Among the cases cited by the plaintiff, under the first class, are *Bowaman v. Reeve*.<sup>1</sup>

Here a Dutch subject made his will; gave a part of his estate in charities, and the residue to his executor. The executor refused to prove the will in Holland, but proved it in England. The property given was taken for debts, and the legatees applied for relief. In this case the executor (who was a party in interest) and the property, were both in England under the jurisdiction of the Court.

*Tourton v. Flower*.<sup>2</sup> This was a bill in Chancery, brought by the administrators of the next of kin to the testator, against the administrator of the testator's executor. The defendants demurred, because there was no representative of the testator before the Court; for it did not appear that the executor of the testator had not made a will and left an executor, in which case the administration granted to one of the defendants would have \*397 been void; and the \*case was decided in favor of the defendants. But there is nothing to show, that if it had been decided in favor of the plaintiffs, distribution would have been ordered in England.

*Kilpatrick v. Kilpatrick*,<sup>3</sup> is a case in which the executor was before the Court.

In these cases, which come under the class of appeals, the whole case was brought before the Court by the appeal.

The cases found in *Ambler*, we think, support our position. In *Burns v. Cole*,<sup>4</sup> administration had been granted in England, and Lord *Mansfield* held, that the Judge in Jamaica was bound by the administration in England to grant the administration in Jamaica to the same person. So in the case cited in the note, administration had been granted to the widow in England and to

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<sup>1</sup> 1 Finch's Prec. in Chan. 577.

<sup>2</sup> 6 Bro. Parl. Cas. 584.

<sup>3</sup> 3 P. Will. R. 369.

<sup>4</sup> Ambler, 415.

the sister in Jamaica ; the Court of Appeals reversed the administration to the sister, and held, that the widow appointed in England was entitled to the administration in Jamaica. The effect of this was to transfer the whole estate to one person. The administration in the plantation was ancillary only. Why is the administration granted to the same person in the colony as in the mother country, unless it be for the purpose of having one account only? The same reason would apply to an administration in an independent nation. Comity will effect with an independent nation, what the power of the Appellate Court compelled the colony to do. In *Pipon v. Pipon*,<sup>1</sup> the domicile of the deceased was in Jersey, and administration on his estate granted there. Administration was also taken out in England, for the purpose of collecting a bond debt of 500*l.*; the application was for a distribution of this sum according to the English law. The Chancellor refused to order a distribution, because \*it ought to be distrib- \*398  
uted according to the laws of the deceased's domicile, in which case the plaintiffs would not be entitled ; and also because this was but a part of the deceased's estate, which remained to be distributed, and the general administrator not being before the Court, the Court could not direct an account of the whole. The same reason will apply for not granting the application of the plaintiff in this case. The general administrator is not before the Court, therefore the Court cannot compel an account of the whole estate ; and they will not grant an application for an account and distribution of a part only.

In *Somerville v. Somerville*,<sup>2</sup> the Chancellor seems very clearly to suppose, that the property was to be transferred to the place of the domicile.

Three cases have arisen in our own State Court, in two of

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<sup>1</sup> Ambler, 25.

<sup>2</sup> 5 Ves. Jr. R. 791.

which the rule we contend for was expressly laid down, and in the other it was unnecessary to consider it.

In *Richards v. Dutch*,<sup>1</sup> it is expressly stated, that those who claim from the bounty of the testator must resort to the country of the testator, where the will was originally proved, and by the laws of which his effects are to be distributed. This case arose from the claim of a legatee under the will, and was very fully argued and considered.

In the case of *Dawes v. Boylston*,<sup>2</sup> in which this was the principal question, the Court say, that the personal effects are to be accounted for, and finally administered in the place, where the deceased was domiciled, wheresoever they may have been collected. That the administration in this country was justly entitled ancillary, in respect to the administration in the jurisdiction of the prerogative Court. That the defendant had an authority to collect and pay debts, and was liable for the contracts and  
\*399 duties of the \*testator, which were recoverable and might be enforced within this jurisdiction; but that he was not liable in the Court of Probate to a decree, either of payment or of distribution, whether to a legatee or heir, upon any partial account to be there rendered and adjusted.

It is made a question by the plaintiff's counsel, whether the administration in India can be called the original or principal administration, in contradistinction to the administration in this country; and they assert, that in England the India administrators or executors are considered as agents merely. This is so, because India is a province of Great Britain; and the Englishmen residing there usually remit their estates to England. Two sets of executors are appointed, one for England and one for India. The executor in England may then well be called the

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<sup>1</sup> 8 Mass. R. 506.

<sup>2</sup> 9 Mass. R. 337.



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principal, because the effects are there. The probate, which establishes the will, is the foundation of all the administrations afterwards granted.

*Webster*, in reply. This argument proceeds on the ground, that no debts or legacies remain unsatisfied in India; and that the executor there has no beneficial interest under the will. The case is presumed to be such, that if the plaintiff were before the proper Court in Bengal, with this bill, such Court would be bound to decree distribution.

It is no answer to the plaintiff, that her bill calls on the Court to apply the laws of another country. Courts apply those laws in many cases. The Sessions did this in *Bruce v. Bruce*. The Master of the Rolls did the same in *Kilpatrick v. Kilpatrick*. The Court of Pennsylvania applied the law of Delaware in *Guier v. O'Daniel*.<sup>1</sup> So far there can be no difficulty or doubt in the case.

\* A decree for the plaintiff must be resisted, if it can be resisted at all, on the ground, that there being an existing administration, *in loco domicilii*, the effects collected elsewhere, must, in all cases, be remitted to the hands of the administrator or executor there, to be by him distributed. This is contended for as a universal rule; subject, however, to one exception, which is, that creditors here have a right to be paid here, out of the funds. \*400

Is there any such universal and inflexible rule? The plaintiff contends there is not. The law on this subject may be considered as of modern origin. It arises from comity, and from the regard, which Courts of one country pay to the private rights of the citizens or subjects of another country. But a rule, in the extent contended for, is not required by any of the reasons, in which the general doctrine or general practice is founded. The

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<sup>1</sup> 1 Binney R. 349.

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property is to be remitted, when any purpose of substantial justice requires it. But if the rightful owner be here, why should it be sent abroad for no reason, but to send him after it? The case under discussion supposes the plaintiff entitled to this property, and that if sent to India, and she were to follow it thither, it could not be refused to her. If the fund were wanted in India for any purpose of the will; or if any person there had rights in it, or claims upon it, the case would be different. But as the fund is here, and as the plaintiff, a citizen of this country, is entitled to it; and as this Court is competent to distribute it, comity cannot require from this Court the compliment of deferring the cause to the jurisdiction of the Court in India. This is not required by that regard to the rights of individuals, subjects of other countries, which has governed the decisions of Courts in these cases. And, that regard to these rights, is the foundation, upon which Courts proceed in such cases, is proved perhaps by the circumstance, that no case is mentioned, probably none exists, \*401 in which the government \* of one country claims property in another, as escheating to itself. The Courts of this country would remit this property to England or to India, to answer the claims of legatees or next of kin there. But they would not remit it for the benefit of the British Exchequer, if there were no legatees or next of kin.

If, then, the question be not a technical one about the jurisdiction of the Court, but of justice and private right, should it not appear, that some purpose of right or justice is to be answered by remitting the property to India?

If there is no known and fixed principle, requiring the rule to be carried to the extent mentioned, the Court will look to the consequences of adopting it in that extent. Many cases of inconveniences have been stated on the other side, which might happen, if the Court should distribute personal property, found here, and belonging to one dying abroad. And no doubt there

are cases, in which convenience, as well as justice would require the fund to be remitted. But the question is, whether this must be done, and in all cases? Or, on the other hand, whether the Court may not do that, in each case, which the justice of that case shall require?

A man might die in India, domiciled there, leaving the bulk of his property, and all his creditors, next of kin, and legatees, here. There may be nothing to be done in India, but collect debts due to the estate. Those may be here, who are entitled to the whole. Shall it all, nevertheless, be sent to India? If not, then there is no such universal rule as has been supposed.

There are many cases, in which decisions have been made inconsistent with the existence of any such rule. One is, where persons dying abroad leave executors, both abroad and in England. The executor in England is bound to distribute what comes to his hands. He is not merely to collect the effects, and remit them to the \* executor acting *in loco domicilii*. *Brooks v. \*402 Oliver*,<sup>1</sup> appears to be a case of this sort. So is *Chetham v. Lord Audley*.<sup>2</sup>

Another case is, where the will is proved in both countries.<sup>3</sup> *Cooper* says, "The Municipal Courts of this country will also, by a principle of the law of nations, in the case of strangers leaving property here, distribute that property, in the case of death, by the laws of their own country, provided such stranger is not domiciled here."<sup>4</sup> He makes no exception for the case of there being another administrator or executor *in loco domicilii*. All these cases and opinions seem to be wrong, if the law be, as stated in one of the cases relied on by the other side,† viz. that all effects and choses in action, wherever collected, must be

<sup>1</sup> Ambler R. 406.

<sup>2</sup> 4 Ves. Jr. R. 72.

<sup>3</sup> *Nesbitt v. Murray*, 5 Ves. Jr. R. 149.

<sup>4</sup> *Cooper's Eq. Pleading*, 121.

† *Daves v. Boylston*.

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accounted for and finally administered in the country, where the deceased had his domicile. The rule is not laid down to that extent, in any other case, or by any writer. The administration *in loco domicilii* may be, and in cases arising in the East and West Indies, very often is, considered as a mere agency. In *Chetham v. Lord Audley*. Lord *Loughborough* says, "I think the appointment of an executor in India, no legacy being given to him, is the appointment of an agent for the management of the estate. They give them the character of executors." In such a case, the creditors and legatees, or next of kin being in another country, the India administration should, from the nature of the case, be considered as auxiliary to the uses of the property and the interest of those concerned. It should be accessory to that administration, which exists, where those are, who have a right to the property.

- \*403 \* In *Jauncy v. Sealy*,<sup>1</sup> there seems to be no objection to calling the administrator *loci domicilii* to account to the administrator in England, provided there had been effects in England. *Tourton v. Flower* is to the same point. These cases are incompatible with the existence of a rule, which renders the administration *in loco domicilii* in all cases the leading one, and treats the other as entirely subordinate. Indeed there will hardly be found to be any such rule, as that where there are two administrations on one estate, existing in different independent countries, one must be considered in all cases as principal, and the other as merely auxiliary and subordinate. Strictly speaking, no such relation can exist between authorities derived from different sources. Each administration is independent of the other; the power of administering issues from different and independent origins. Courts of law and equity will compel administrators, who act in an official capacity, so to act as to answer the ends of justice; and for this

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<sup>1</sup> 1 Vernon R. 377.

purpose they will, if necessary, hold an administrator in one country to be trustee of an executor or administrator in another country. But then a case must be made out, in which justice and equity require this. There may be administrations with equal claims to be considered single and independent. Suppose a man domiciled in England, to make his will there, leaving property both there and here. He may give a legacy to a person here, charged on the property here, and a legacy to a person in England, charged on the property there; and he may appoint executors in both countries. Should the legatee here be referred in such case to England for payment? Or suppose that there were, in such case, only the English executor, and he should come here, prove the will, and obtain the property by the aid of the laws of this country, could he not then \*be com- \*404 pelled to pay the legacy here? If we go one step further and suppose, that instead of coming with the will, he should send it, and it should be proved, and administration granted, at his request, to some one, with the will annexed, and then suppose further, that instead of a legatee applying for a legacy, the next of kin apply here for a surplus, we have the present case. A will might be made abroad, which could be only executed here. It might charge annuities or the maintenance of infants or relatives on the funds in this country, and be made payable on contingencies, which could be known and ascertained nowhere else. It might direct property to be invested in stock here, for the purposes of the will. A testator in England, having property here, might bequeath it to charitable purposes here. Such a trust must be enforced here or nowhere; because the English Court of Chancery has declined to enforce the execution of a charity in favor of objects existing under a foreign government.<sup>1</sup>

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<sup>1</sup> *Attorney-General v. City of London*, 3 Brown Ch. Cases, 171.

A principal case relied on by the counsel for the defendant is *Pipon v. Pipon*. As to that case, it may be remarked 1st. That the plaintiff there had clearly no right. 2dly. That the plaintiff did not ask for distribution according to the laws of Jersey. Lord *Hardwicke* seemed to think something remained to be done in Jersey. Nothing can be proved by that case, except that the succession is to be governed by the law of the domicile.

It has been said, that from an expression of the Master of the Rolls in *Somerville v. Lord Somerville*, it may be inferred, that he would remit the funds for distribution to the Court of the domicile, instead of distributing them himself. "The country," he says, "in which the property is, would not let it go out of that, until it knew by what rule it is to be distributed." But this expression  
 \*405 cannot \*warrant the inference drawn from it. And in the very cases in which it was used, the Master of the Rolls appears to have decreed distribution according to the laws of Scotland.

In *Dawes v. Boylston* it is said, that creditors here are to be paid before the fund is to be remitted. This is stated without qualification, and without reference to the case of other creditors existing abroad. This exception opens a door to all the inconveniences, which have been stated, and to great injustice in many cases; because the greater part of the property might be here, while the greater amount of debts might be abroad, and the whole estate insufficient to pay all. And it is not easy to see, why the next of kin, there being no debts, have not as well founded a right to the property, as creditors, where there are debts. So also of legatees. It is not matter of favor, in Courts of Equity, to compel the payment of legacies, or to decree distribution; nor have they any broader discretion in such cases than in the payment of debts.

It is difficult to perceive the reason, why debts are to be paid, and "legacies" not paid, or the surplus not distributed. By the law of England assets are to be marshalled, and judgments and

bond debts are to be paid before debts by simple contract. If a simple contract creditor be found here, his debts having been contracted in India, and with reference to the laws of that country, may he obtain satisfaction out of the funds here, and leave judgment creditors and bond creditors unpaid in India? It would seem at least to be equitable, that debts contracted in India should be paid according to the laws of India, wherever the fund might be found. A general rule, that all debts asserted here, wherever contracted, should in all cases be paid out of the funds here, would seem to be as objectionable, as the supposed rule, that legatees and next of kin must, in all cases, resort to the forum of the domicile. It is possible, \*that the Judges in *Dawes v. Boylston* might have felt themselves restrained by the nature of the jurisdiction, which they were exercising. They might not consider themselves as possessed of all the power of a Court of Equity. If there were no inconvenience of that sort, and if the merits of the case had required it, I am not able to see, why a decree might not have been made in that case in favor of the inhabitants of Boston. A conclusive reason in favor of such decree would seem to be, that if the will of the testator could not be enforced in that particular, by the Court here, it could not be enforced at all, and the testator's object would be wholly defeated. #406

In the subsequent case of *Stevenson v. Gaylord*, the same Court appear not to have considered any rule established in *Dawes v. Boylston*. The Court in that case says, "If it should appear upon due examination in our Probate Court, that Tilbalds had his home in Connecticut, we should cause the balance, remaining in the hands of the administrator here, to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut, under the decree of the Court there." This language is not consistent with the supposition, that the Court had either found or made a rule, requir-

ing a transmission of the fund in all cases. I consider, therefore, that the decisions in the Supreme Court of this State, taken together, have established no such rule as the defendant contends for.

If no settled rule has been shown, by which the plaintiff must be referred to India for distribution, there is no principle of equity opposed to granting her relief here. The defendant professes to be trustee for the executors in India, and the case is such, that if the executors in India shall receive the money, they will be trustees for the plaintiff. Then why may not the plaintiff treat the defendant as her trustee, and claim the money directly from  
\*407 him. There is \*no question about sufficient parties. The executors in India have had notice of this suit, and the defendant represents them in it. A decree here will protect him against them. He has collected this fund through the assistance of the judicial tribunals of this country; and if he shall now distribute under their decree, he cannot be made further answerable to any body.

STORY J. The question, which has now been argued, lies at the very foundation of the plaintiff's suit, and is of great importance and no inconsiderable difficulty. I have taken time to consider it; and after a full consideration of all the authorities, commented on with so much learning and ability by the counsel, I am now to pronounce the result of my own judgment on the case.

For the purposes of the argument, it is assumed or conceded, that the testator (dying intestate as to the residue of his estate, of which distribution is now sought) was at his decease domiciled at Calcutta, in the East Indies; that his will has been duly proved, and administration there taken upon his estate by his executor; that the defendant has under the directions of that executor taken administration of the testator's estate in Massachusetts, and



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in virtue thereof has received a large sum of money, which now remains in his hands; that no part of this money is wanted at Calcutta for the payment of any debts or legacies under the will; and that the plaintiff is a citizen of Rhode Island, and domiciled there; and, as one of the next of kin of the testator, is entitled to a moiety of the undivided residue of the testator's estate. The question then is, whether, under these circumstances, this Court as a Court of Equity can proceed to decree an account and distribution of the property so in the hands of the defendant; or is bound to order it to be remitted to Calcutta, to be distributed by the proper tribunal there.

\* There are some points involved in the argument, which may \*403 be disposed of in a few words. In the first place the distribution, whether made here or abroad, must be according to the law of the place of the testator's domicile. This, although once a question vexed with much ingenuity and learning in Courts of law, is now so completely settled by a series of well considered decisions, that it cannot be brought into judicial doubt.<sup>1</sup> In the

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<sup>1</sup> Vattel, B. 2, ch. 8, § 110. Denizart, *voce Domicil.* § 3, 4. Voet, Lib. 38, tit. 17, § 34. Vinnius, *Select. Quest.* Lib. 2, ch. 19. Van Leeouen, *Censura Forensis*, Lib. 3, ch. 12. Hub. Par. 1, Lib. 3, tit. 13, § 20, *sub finem.* Id. Par. 2, Lib. 1, tit. 3, § 15. Bynkershoek, *Quest. Priv. Juris*, Lib. 1, ch. 16, p. 334, 335 (edit. 1767, folio). Kaimes, *Princ. Equity*, B. 3, ch. 8, § 4. Erskine, *Inst.* B. 3, tit. 9, § 4. *Pipon v. Pipon*, Ambler R. 25. *Burn v. Cole*, Ibid. 415. *Thorne v. Watkins*, 2 Ves. R. 35. *Bruce v. Bruce*, 2 Bos. & Pull. R. 229, note. 6 Bro. Parl. Cas. 566. *Balfour v. Scott*, Ibid. 550. *Bempde v. Johnstone*, 3 Ves. Jr. R. 198. *Sill v. Worwick*, 1 H. Bl. R. 690. *Hog v. Lashley*, 6 Bro. Parl. Cas. 577. *Drummond v. Drummond*, Ibid. 601. *Phillips v. Hunter*, 2 H. Bl. R. 402. *Hunter v. Potts*, 4 T. R. 182. *Somerville v. Somerville*, 5 Ves. Jr. R. 750. *Dixon's Executors v. Ramsay's Executors*, 3 Cranch R. 319. *Goodwin v. Jones*, 3 Mass. R. 514. *Richards v. Dutch*, 8 Mass. R. 506. *Daves v. Boylston*, 9 Mass. R. 337. *Desebates v. Berquier*, 1 Binn. R. 336. *Guier v. O'Daniel*, Ibid. 349, note. *Potter v. Brown*, 2 East R. 124.

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present case, the law of Calcutta, or rather of the province of Bengal, is, as I apprehend, the law of England ; and as that is the same as the law of Massachusetts, the distribution would be the same, as if the testator had died domiciled here. In the next place, the Court of Chancery has an ancient and settled jurisdiction to decree an account and distribution of a testator's and an intestate's estate, on the application of the legatees or next of kin ;<sup>1</sup> and supposing this to be a fit case for the application of its authority, the present suit would fall completely within that jurisdiction. In the next place, the equity powers and au-  
 \*409 thorities of the Courts of the \* United States are, in cases within the limits of their constitutional jurisdiction, co-equal and co-extensive, as to rights and remedies, with those of the Court of Chancery. The present is a suit between citizens of different States, over whom this Court has an unquestionable right to entertain jurisdiction ; and it will follow of course, that the plaintiff is entitled to the relief she prays for, if it be competent and proper for any Court of Equity to grant it.

Having disposed of these preliminary points, we may now return to the consideration of the great question in controversy. Stated in broad terms it comes to this, whether a Court of Equity here has competent authority to decree distribution of intestate property collected under an administration granted here, the intestate having died domiciled abroad, and the distribution being to be made according to the law of his foreign domicile. The counsel for the defendant deny such authority under any circumstances ; the counsel for the plaintiff as strenuously assert it.

This is a question involving the doctrines of national comity, or, what may be more fitly termed, international law. And looking to it as a question of principle, it would not seem to be at-

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<sup>1</sup> *Mathews v. Newly*, 1 Vern. R. 133. *Howard v. Howard*, Ibid. 134. *Goodwin v. Ramsden*, Ibid. 200. *Winchester v. Norcliffe*, 2 Rep. in Chan. 367. Mitford, Pl. Ch. 114. Cooper's Eq. Pl. 39, 127.

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tended with any intrinsic difficulty. The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists, why the Court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice, which it is in its own power to administer without injustice to any other person? I say without injustice, because it may be admitted, that a Court of Equity ought not to be the instrument of injustice; and that if in the given case such would be the effect of its interposition, it ought to withhold its arm. This, however, would be an objection, not to the general authority, but to the exercise of it under particular circumstances. The argument, however, goes the length of denying the existence \* of that authority, whatever \*410 may be the circumstances of the case. Yet cases may be readily imagined, in which it might not be inequitable to interfere, nay, in which there might be very cogent reasons for interference. Suppose there are no debts abroad, and no heirs or legatees abroad, but all are here, and apply to the Court for a decree of distribution; is the Court bound to remit for the vain purpose of putting the legatees or distributees to great expense and delay in seeking their rights in a foreign tribunal? Suppose two executors are appointed by the testator, one abroad and one here (and such cases are not uncommon),<sup>1</sup> and the bulk of the property is collected here, and all the legatees are here; shall the Court direct the domestic executor to remit the whole property to the foreign executor, because it is to be distributed according to the law of the foreign domicile? Suppose further, the executor here is himself the residuary legatee, or, in case of intestacy, the administrator here is the next of kin, and entitled to the surplus; shall he be required to remit the property abroad, that he may be there decreed to receive it again? Suppose legacies, payable out of

<sup>1</sup> *Chetham v. Lord Audley*, 4 Ves. Jr. R. 72. *De Mazar v. Pybus*, 4 Ves. Jr. R. 644.

particular funds here, or a specific legacy of property here, shall not the legatee be entitled to recover of the administrator or executor here, because the testator was domiciled in a foreign country? Suppose a legacy to charitable uses in this country, good by our law, but which, from motives of policy, the Courts of the foreign country decline to enforce; shall it be said, that our Courts are bound to enforce, by remitting the property there, a policy, by which they are injured? Whatever may be thought of the last case, there can be no doubt, that the others present circumstances, where equity would strongly persuade us, that it

\*411 would be the duty of our \* Courts to entertain jurisdiction, and decide on the rights of the parties. There are many other cases, in which it would seem fit to vindicate and assert the proper rights of our own citizens and our own laws. This very case, under one aspect, would have presented a question, of which our own tribunals might as justly have claimed an exclusive cognizance, and which, I trust, they would have decided with as much impartiality, as the tribunals of the testator's domicile. Major Murray was an American citizen, born in Rhode Island; and if he left no lawful heirs (as has been argued in a former part of this case), his property here, supposing he had acquired no foreign domicile, would have undoubtedly fallen as an escheat to that State; and it would deserve consideration, whether the change of domicile would work any alteration in that respect. Under such circumstances, would it be proper to send the State of Rhode Island to solicit its rights from a foreign tribunal in the East Indies?

One objection urged against the exercise of the authority of the Court is, that as national comity requires the distribution of the property according to the law of the domicile, the same comity requires, that the distribution should be made in the same place. This consequence, however, is not admitted; and it has no necessary connexion with the preceding proposition. The

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rule, that distribution shall be according to the law of the domicile of the deceased, is not founded merely upon the notion, that moveables have no *situs*, and therefore follow the person of the proprietor; even interpreting that maxim in its true sense, that personal property is subject to that law, which governs the person of the owner.<sup>1</sup> Nor is it, perhaps, founded upon the presumed intention of the deceased, that all his property should be distributed according to the law of the place \*of his domicile, with \*412 which he is supposed to be best acquainted and satisfied; for the rule will prevail even against the express intention of the deceased, unless the mode in which that intention is expressed, would give it legal validity as a will.<sup>2</sup> It seems, indeed, to have had its origin in a more enlarged policy, founded upon the general convenience and necessities of mankind; and in this view the maxim above stated flows from, rather than guides, the application of that policy. The only reason, why any nation gives effect to foreign laws within its own territory, is the endless embarrassment, which would otherwise be introduced in its own intercourse with foreign nations. The rights of its own citizens would be materially impaired, and, in many instances, totally extinguished by a refusal to recognise and sustain the doctrines of foreign law. The case now under consideration is an illustration of the perfect justice and wisdom of this general practice of nations. A person may have moveable property and debts in various countries, each of which may have a different system of succession. If the law *rei sitæ* were generally to prevail, it would be utterly impossible for any such person to know in what manner his property would be distributed at his death, not only from the uncertainty of its situation from its own transitory nature, but from the impracticability of knowing, with minute accuracy,

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<sup>1</sup> *Sill v. Worswick*, 1 H. Bl. R. 690.

<sup>2</sup> *Desobats v. Berquier*, 1 Binn. R. 366. 2 Hub. B. 1, tit. 3, § 4.

the law of succession of every country, in which it might then happen to be. He would be under the same embarrassment, if he attempted to dispose of his property by a testament ; for he could never foresee, where it would be at his death. Nay more, it would be in the power of his debtor, by a mere change of his own domicile, to destroy the best digested will ; and the accident of a moment might destroy all the anxious provisions of an excellent parent for his whole family. Nor is \*this all. The nation itself, to which the deceased belonged, might be seriously affected by the loss of his wealth, from a momentary absence, although his true home was in the centre of its own territory. These are great and serious evils, pervading every class of the community, and equally affecting every civilized nation. But in a maritime nation, depending upon its commerce for its glory and its revenue, the mischief would be incalculable. The common and spontaneous consent of nations, therefore, established this rule from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and private enterprise of all. It flowed from the same spirit, that dictated judicial obedience to the foreign commissions of the Admiralty. *Sub mutua vicissitudinis obtentu, damus petimusque vicissim*, is the language of the civilized world on this subject. There can be no pretence, that the same general inconvenience or embarrassment attends the distribution of foreign effects according to the foreign law by the tribunals of the country, where they are situate. Cases have been already stated, in which great inconvenience would attend the establishment of any rule, excluding such distribution. It may be admitted also, that there are cases, in which it would be highly convenient to decline the jurisdiction, and to remit the parties to the *forum domicilii*. Where there are no creditors here, and no heirs or legatees here, but all are resident abroad, there can be no doubt, that a Court of Equity

would direct the remittance of the property upon the application of any competent party.

The correct result of these considerations upon principle would seem to be, that whether the Court here ought to decree distribution, or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case. That there ought to be no universal rule on the subject; but \*that every nation is bound to \*414 lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equities.

It is farther objected, that a rule, which is to depend for its application upon the particular circumstances of each case, is too uncertain to be considered a safe guide for general practice. But this objection affords no solid ground for declining the jurisdiction, since there are an infinite variety of cases, in which no general rule has been or can be laid down, as to legal or equitable relief, in the ordinary controversies before judicial tribunals. In many of these, the difficulty is intrinsic in the subject matter; and where a general rule cannot easily be extracted, each case must, and indeed ought to, rest on its own particular circumstances. The uncertainty, therefore, is neither more nor less than what belongs to many other complicated transactions of human life, where the law administers relief *ex æquo et bono*.

Another objection, addressed more pointedly to a class of cases, like the present, is the difficulty of settling the accounts of the estate, ascertaining the assets, what debts are sperate, what desperate, and, finally, ascertaining what is the residue to be distributed, and who are the next of kin entitled to share. And to add to our embarrassment, we are told, that we cannot compel the foreign executor to render any account in our Courts. I agree at once, that this cannot be done, if he is not here. But

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trator with the will annexed of a foreign testator is not bound, upon taking administration here under our Statute,<sup>1</sup> to account for any property received by him abroad under the foreign administration. And the Court relied upon the express language \*417 of the Statute, that the \* Judge of Probate in such cases may take bonds, "or grant administration of the said testator's estate lying in this government, with the will annexed, and settle the said estate in the same way and manner, as by law he may or can upon the estates of testators, whose wills have been duly proved before him." The whole reasoning of the Court manifestly proceeds upon the supposition, that as to the estate here, the Judge of Probate may proceed to settle it, like other estates; and so certainly is the language of the Statute. The case then is, as far as it goes, an authority against the defendant. Soon afterwards the same case came again before the Court,<sup>2</sup> when it was distinctly held, that the administrator was bound to account before the Probate Court for the effects here at the suit of the appellants, who were residuary legatees.<sup>3</sup> On that occasion the Court said, the administration here "is to be considered, not only as a means of collecting the effects of the deceased within this jurisdiction, but of answering, according to the rules of the same jurisdiction, the demands of creditors and all legal liens upon those effects. By the will, under which the administrator is acting, it appears, that the appellants are residuary legatees. They have, therefore, a direct and immediate interest in the account of the administrator, and in every process, which can be instituted, to determine the amount of the effects collected, and the charge, to which they are liable; or, in other words, of obtaining the residuum of T. B.'s (the testator's) effects within this jurisdiction."

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<sup>1</sup> Stat. 24 June, 1785, ch. 12.

<sup>2</sup> *Selectmen of Boston v. Boylston*, 4 Mass. R. 318.

<sup>3</sup> *S. P. Jauncey v. Sealey*, 1 Vern. R. 397.



With respect to the merits of the decree in this case, it is no part of my business to enter into any discussion. But it is most manifest, that the Court did contemplate, that the administrator was bound fully to account here, not \* only to creditors, but to <sup>\*418</sup> all others entitled to the fund, as next of kin, or residuary legatees. And if the Court had been then of opinion, that it was bound to remit the proceeds abroad at all events, it seems difficult to conceive any substantial grounds, upon which their decree rested. For if the account was to be taken here, and then the balance in the hands of the administrator remitted, it would still be necessary to take the account again in the foreign jurisdiction; and if that jurisdiction could reach all the effects received here, as well as abroad, what was done here could not be conclusive upon it. And if the foreign tribunal could not, in virtue of the original grant of administration, compel the administrator to account for effects received here by the exercise of its ordinary powers, (for I speak not here of the extraordinary powers of a Court of Chancery,) the legatees would be without relief in both jurisdictions. This case came again before the Court in a suit brought under the direction of the Court upon the probate bond of the administrator.<sup>1</sup> In the intermediate time, however, the Court in *Richards v. Dutch*,<sup>2</sup> decided generally, without assigning any reasons, that under the Statute of 1785, ch. 12, the administrator may be held to pay debts to creditors here, if any such are claimed of him; but that legatees, who claim only from the bounty of the testator, must resort to the country of the testator, where the will was originally proved, and by the laws of which his effects are to be distributed, to obtain the bounty they claim. Accordingly this doctrine was recognised in *Daves v. Boylston*, Mr. Justice *Sewall* (who seems to have been the only Judge, who sat upon its final decision) declaring, "that the rights

<sup>1</sup> *Daves v. Boylston*, 9 Mass. R. 337.

<sup>2</sup> 8 Mass. R. 506.

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of legatees, especially residuary legatees, as well as of the next of kin in a case of intestacy, depend upon the laws of the country, \*419 where the deceased \* had his home and domicile, from whom the bequest or succession is claimed; and to that purpose, all the choses in action are to be deemed local, to be there accounted for and finally administered, wherever collected, or accruing in possession to the executor or administrator." And farther, that the administrator, by virtue of his administration here, "has an authority to collect and pay debts, and is liable for the contracts and duties of the testator recoverable, and which may be enforced within this jurisdiction; but is not liable, in the Court of Probate, upon any partial account to be there rendered and adjusted, to a decree either of payment or distribution, whether for a legacy, or to any claiming by a supposed succession, of the deceased's effects." And farther, that the jurisdiction abroad is "exclusive in whatever regards the final settlement of the estate, the ascertaining of the residue after payment of the debts, and the appointment and distribution thereof." The decision of the Court upon the whole view of the case, was, that the administrator was compelled to render an inventory and account to the Probate Court of the assets received here; and that his refusal so to do was a breach of the probate bond; but that the residuary legatees were not entitled to any farther relief.

It has been supposed by the plaintiff's counsel, that this doctrine has been shaken in a more recent case,<sup>1</sup> where the Court, advertng to the facts, said, "If it should appear upon due examination in our Probate Court, that T. (the deceased) had his home in Connecticut, we should cause the balance remaining in the hands of the administrator here, to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut, under the decree of the Probate Court there." But I cannot perceive in this lan-

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<sup>1</sup> *Stevens v. Gaylord*, 11 Mass. R. 256.

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guage any sufficient \*warrant to justify me in the conclusion, that it was meant to overturn, or bring into doubt, two solemn decisions of the Court. I feel myself compelled, therefore, (very reluctantly, I confess,) to admit, that by the law of Massachusetts the Probate Courts have no jurisdiction, either originally or by a suit on the probate bond, to compel a final settlement or distribution of the estate of a foreigner, whose assets have been collected here under what is called, an ancillary or auxiliary administration. And if this were a case depending upon the local law of the State, so conclusive should I deem it upon me, not only from the learning and authority of the Court itself, but from the necessity of holding, upon principles of public convenience and policy, the judicial construction of State tribunals upon their own laws conclusive upon all other tribunals, that I should not scruple to adopt it in its whole extent, whatever might be my own doubts on the subject.

But the case here does not depend upon the local law of Massachusetts. Although a Court of Probate of that State can administer no relief in virtue of its statutable powers, it does not follow, that a Court of Chancery cannot in the exercise of its equitable jurisdiction; for the equity powers of such a Court must be judged of by its own principles applied to its own organization, and not by the limited rules applied to ecclesiastical tribunals. Besides; the question here is properly a question of international law, dependent upon no local usages, but resting on general principles. The parties are citizens of different States, and their rights must be decided, not merely by the authority of one State, but by principles applicable to all States. Whether, therefore, we are to decide by the doctrines of Massachusetts, or by the opposing doctrines of other States, must depend upon the reasons, upon which those doctrines are respectively built. That a contrariety of opinion exists is most manifest, since the Courts of Pennsylvania \*sustain jurisdiction in cases like \*421

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the present, and decree distribution to the next of k.n according to the law of the place of his domicile.<sup>1</sup>

In this state of embarrassment, it would have been a great relief to my mind, if the reasons, on which the State Court of Massachusetts proceeded, had been expounded with the usual fulness. But no reasons are given for this particular doctrine. Nor do all the authorities which have been cited on the present argument, appear to have been brought in review before that Court. There is, too, a qualification of its doctrine in favor of creditors, the ground of which it would have been most desirable to ascertain. Why should not legatees and distributees be entitled to recover out of the assets here, as well as creditors? It is true, that legatees claim by the bounty of the testator; but it is a legal right, as fixed and vested as the right of a creditor. And, as to distributees, the case is still stronger; for that rests, not on the bounty of the intestate, but on the law of the land, which, at the same time, enables the creditor to receive his debt out of the assets, and the next of kin to claim the residue. If it be said, that it belongs to the public policy of a country to sustain the claims for debts due to its citizens, it seems to me no less to belong to that policy to sustain any other claims of its citizens, which are founded in justice and law. If it be said, that the assets are to be distributed by a foreign law, and it is very difficult and laborious to learn, what that law is, and to apply it correctly, the same objection applies to the payment of debts. The priority of debts, the order of payment, the marshalling of assets for this purpose, and, in cases of insolvency, the mode of proof as well as of distribution, differ in different countries. And if in case of debts, the Court here is to apply the *lex domicilii*,  
\*422 the \*same embarrassment will arise, as in other cases of dis-

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<sup>1</sup> *Guier v. O'Daniel*, 1 Binn. R. 349, note; and see also *Desobats v. Berquier*, 1 Binn. R. 336.

tribution to the next of kin. There is no more difficulty in the order of payment of legacies, than of debts. And Courts of law must, in these cases, ascertain and apply the foreign law precisely in the same manner they do in other cases.<sup>1</sup> I pressed the learned counsel for the defendant, at the argument, for a solid ground, on which to sustain the distinction in favor of creditors, either upon principles of national comity, or public convenience, or substantial justice. I heard no vindication of it in either view. And cases may readily be imagined, in which such a distinction might work injustice. Suppose by the *lex domicilii*, the debts are primarily a charge on the realty, and not on the personal estate; shall the creditor here be permitted to exhaust the personal assets here, when the succession to the real and personal estate may be different in the foreign country? Suppose the assets abroad and at home have a different order of succession or distribution, shall the creditor here be permitted to defeat that order? † If not, then the Court here must apply the *lex domicilii* to protect the heirs; and must ascertain the nature and extent of that law;<sup>2</sup> and if so, why not proceed to distribute the property among those, who are the *cestuis que trust* entitled to it. The case was very properly put at the argument, whether a Court here could refuse here to sustain a suit by a *cestui que trust* against his trustee here, simply because the trust originated in, and was to be governed by, the law of another country. It was admitted, that it could not; and so certainly are the

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<sup>1</sup> *Fleaubert v. Turst*, Prec. Ch. 207. S. C. 1 Bro. Parl. Cas. 38. *Freemoult v. Dedire*, 1 P. W. R. 429.

† There are some curious cases of this conflict of rights, growing out of the laws of different countries. See *Annandale v. Annandale*, 2 Ves. R. 381. *Balfour v. Scott*, 6 Bro. Parl. Cas. 560. *Drummond v. Drummond*, Ibid. 601.

<sup>2</sup> Vide *Bowman v. Reeve*, Prec. Chan. 577.

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\* authorities.<sup>1</sup> But it was said, that the administrator here is a trustee for the administrator abroad, and not for the next of kin ; and that the *cestuis que trust* cannot follow the property in the hands of a mere agent of the trustee. These positions, in their general latitude, are certainly not well founded. The administrator here is not a mere agent of the administrator abroad. He collects and receives the assets in his capacity as administrator generally ; and so far as it may be wanted for payment of debts and legacies, he holds it in trust for the creditors and legatees, and as to the residuum in trust for the next of kin. And even if he were a mere agent of a trustee, the *cestuis que trust* would be entitled to claim the fund directly from him ; for a Court of Equity may follow a trust fund in whosoever hands it may be found.<sup>2</sup> Could the administrator abroad sue the administrator here to recover the assets collected here ? I apprehend not. The creditors, legatees, and heirs, are the only persons competent to sue in respect to their own interests ; and the administrator, as such, could have no remedy.<sup>3</sup> I confess myself unable to admit the distinction in favor of creditors, without admitting, at the same time, the like rights in favor of legatees and heirs. Nor have I been able to find that distinction sustained or adverted to in any other authorities.

It remains to examine the English decisions upon the point now before the Court. The earliest case, which I have met with, is *Bowman v. Reeve*,<sup>4</sup> which was a suit brought by specific legatees of a person domiciled in Holland against the executor \*424 and residuary legatee, who had \* taken out letters of administra-

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<sup>1</sup> *Feaubert v. Turst*, Prec. Ch. 207. S. C. 1 Bro. Parl. Cas. 38. *Freemoult v. Dedire*, 1 P. W. R. 429.

<sup>2</sup> *Newland v. Champion*, 1 Ves. R. 105. *Doran v. Simpson*, 4 Ves. Jr. R. 651.

<sup>3</sup> See *Stevens v. Gaylord*, 11 Mass. R. 256.

<sup>4</sup> Prec. Ch. 577.

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tion, to recover satisfaction out of such residuum for the value of their specific legacies, which had been taken possession of by the creditors in Holland in payment of their debts; and the Chancellor decreed satisfaction accordingly, and did not remit the legatees for relief to the domestic forum. Next followed *Tourton v. Flower*; <sup>1</sup> but there no such objection was raised; and the case went off upon another ground, viz. the want of competent parties to sustain the suit against the English administrator. Then came the case of *Pipon v. Pipon*. <sup>2</sup> It was a bill in Equity, brought by the plaintiffs as representatives of several sisters of the intestate, against the defendants, who were his sisters, and had taken administration of the intestate's estate in London, and had received a bond debt of 500*l.* due there. The suit was for a distribution of the 500*l.*; and the question was, whether it should be distributable according to the laws of England, it being found within the province of Canterbury, in which case the plaintiffs would be entitled to a part? Or whether it should be distributed according to the laws of Jersey, where the intestate resided at the time of his death, in which case the plaintiffs by those laws would not be entitled to any part of it? Lord *Hardwicke* dismissed the bill, and is reported to have said, "I should be very unwilling to go into the general question, for it is very extensive. This is merely the case of a debt. The question, then, is, whether the plaintiffs, as next of kin, have a right to call for an account of this part of the residue only? And I think there is not sufficient ground for it. If I were to go into the general question, the personal estate follows the person, and becomes distributable according to the law or custom of the place, where the intestate lived. The words of the Statute are very particu-

<sup>1</sup> 3 P. W. R. 369.

<sup>2</sup> Ambler R. 25. S. C. In Mr. Blunt's Edition, Appx. D, Lord *Hardwicke's* opinion is given from Sergt. *Hill's* MSS.

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lar, viz. the residue undisposed of \* is to be distributed, so that the plaintiffs are wrong in coming into this Court for an account of only part; for by that Statute, an account must be decreed of the whole, and the general administrator is not before the Court." I cannot help suspecting, that there is some error in the language here imputed to Lord *Hardwicke*; for if the distribution was to be according to the *lex domicilii*, the Statute of distributions,<sup>1</sup> alluded to by his lordship had nothing to do with the case, for it was not governed by the law of England, but of Jersey. And if the distribution was to be by the *lex loci rei sitæ*, then the fund in the hands of the administrator here was the whole residue, which was distributable under the Statute. So that, in either way, the reasoning was untenable. The true ground, on which the judgment stands, is that suggested by his lordship himself; the plaintiffs were not entitled, for the assets were distributable according to the law of Jersey, which excluded them from any share. And so the case was understood by Lord *Mansfield*,<sup>2</sup> and by Lord *Loughborough*,<sup>3</sup> and also by Lord *Hardwicke* himself, in a subsequent case.<sup>4</sup> And it may, perhaps, be gathered from this last case, though obscure in its language, that his meaning in the other reasoning was, not that the next of kin might not maintain a bill for a distribution of the residue here, but that to entitle him to maintain such suit, he must show, that he is entitled by the *lex domicilii*. "It was never thought," said his lordship, alluding to the case of *Hanse Towns v. Jacobson*, "that on the death of a person having those funds, a bill must be brought by the next of kin of a particular part of that personal estate; the rule must be, that a bill must be brought for the

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<sup>1</sup> Stat. 22 and 23 Car. 2, ch. 10.

<sup>2</sup> *Burn v. Cole*, Ambler R. 415.

<sup>3</sup> *Sill v. Worswick*, 1. H. Bl. R. 665, 690.

<sup>4</sup> *Thorne v. Watkins*, 2 Ves. R. 35.



whole, according to what I laid down in \* *Pipon v. Pipon*; otherwise it would destroy the credit of the funds; for no foreigner would put into them if, because a title must be made up by administration or probate of the prerogative Court of England, it was to be distributed different from the laws of his own country." The reason here given shows, that his lordship was referring to a bill by the next of kin claiming against the *lex domicilii*, and not to a bill by the next of kin claiming by that law. And surely it will not be pretended, that a person, who by the *lex domicilii* would be exclusively entitled, as heir, to the residue of the personal estate situate abroad, although not entitled to the residue of the personal estate situate at home, could not maintain a suit for the residue abroad, simply because he could not make title also to the residue at home. Suppose a specific legacy of all the property abroad, shall not the legatee be entitled to claim it here, because he cannot also claim all the property devised to others?<sup>1</sup> Lord *Hardwicke* certainly did not mean to say, in *Thorne v. Watkins*,<sup>2</sup> that a distribution might not be legally made under a foreign administration; for he says, "it is generally granted on foundation of the administration granted here, and then it must be distributed as here;" not that it must be distributed here. And in that very case he compelled a Scotch executor to account for and distribute funds, which were received by him to be distributed according to the law of Scotland, he being at the same time an English administrator of one of the next of kin, under the Scotch law entitled to share, who died domiciled in England. It is true that the case before the Court called for an account of the intestate's estate only; but if Lord *Hardwicke* had believed, that the account and distribution of the Scotch estate belonged of right to Scotch tribunals only, it seems difficult to believe, that the fact \* that the administrator was also executor \*427

<sup>1</sup> Vid. *Nisbett v. Murray*, 5 Ves. Jr. R. 149.

<sup>2</sup> 2 Ves. R. 35.

of the Scotch estate, would have made any difference in his decision.

But if Lord *Hardwicke's* opinion be not susceptible of the explanation, which I have endeavoured to give to it, it is not too much to declare, that it is entitled to less weight, than it might otherwise claim, from the very great light, which the learned discussions of more modern times have thrown over the whole subject.

In *Kilpatrick v. Kilpatrick*,<sup>1</sup> Lord *Kenyon*, in a case, where money was in Court belonging to a Scotch estate, instead of remitting it to Scotland, decreed distribution according to the Scotch law, giving to the executor, who was also residuary legatee, one moiety, and to the widow the other moiety, which she was entitled to claim by the *jus relictæ* of Scotland. In form the case differs very much from that now before the Court; but, in substance, the testator was by the Scotch law intestate as to the moiety of the personal estate, which was decreed to the widow; for of that portion he could not legally dispose by testament. Yet the objection might have been urged there, which Lord *Hardwicke* is said to have urged in *Pipon v. Pipon*, that the widow could not sustain a claim for a moiety of this portion of the estate, but ought to bring a bill for a moiety of the whole estate, which could only be in Scotland.

In *Bruce v. Bruce*,<sup>2</sup> the whole question was most elaborately discussed, whether the *lex rei sitæ* or the *lex domicilii* was to prevail in the distribution of intestate property. The case arose in the Court of Sessions in Scotland, between the heirs claiming by the law of Scotland and those claiming by the law of England; and the Court decreed distribution of the property according to the law of England; \* and this decree was affirmed  
 \*428 in the House of Lords. During the whole of this discussion,

<sup>1</sup> Cited 6 Bro. Parl. 584.

<sup>2</sup> 2 Bos. & Pull. R. 229, note; and 6 Bro. Parl. Cas. 566.

not a doubt was breathed by any one, that the Court was competent to decree the distribution. This was followed up by *Balfour v. Scott*,<sup>1</sup> where the same points were in judgment; and by *Hog v. Lashley*,<sup>2</sup> where the same principle was applied to testate property.

In *Bempde v. Johnstone*,<sup>3</sup> there were cross bills filed for distribution by different heirs, according to the law of Scotland and of England; and the question was, where the intestate was domiciled. The Lord Chancellor decided, and his domicile was in England, and decreed distribution accordingly.

In *Somerville v. Somerville*,<sup>4</sup> precisely the same question arose; and the Master of the Rolls, (Sir R. P. Arden,) after a most elaborate argument, decided, that the intestate's domicile was in Scotland, and decreed distribution according to the law of Scotland.

It is remarkable, that the objection, which has been urged at the bar, never occurred, either to the learned counsel or to the Court in any of those cases. I can account for it in one way only, and that is, that the law was considered clearly settled, that such a distribution might be made, whenever there were competent parties before the Court to require it.

It has been stated at the bar, that in all the cases, in which the English Courts have decreed distribution, the original executors or administrators were before the Court. Whether this be so or not, does not clearly appear in all the cases. But, in my judgment, this circumstance is wholly immaterial. The administrator here is not the less an administrator, because he is not clothed with the same \* character abroad. If the Court can \*429 compel a distribution of the assets here, there can be no distinction, whether the person, who administers them, be or be not the

<sup>1</sup> 6 Bro. Parl. Cas. 550.

<sup>2</sup> 3 Ves. Jr. R. 198.

<sup>3</sup> Ibid. 577.

<sup>4</sup> 5 Ves. Jr. R. 750.

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original administrator. It is sufficient, that he is the legal and exclusive representative of the deceased, as to those assets. And if, because the foreign administrator is within the jurisdiction, the Court will compel him to account and distribute all the assets, foreign as well as domestic, it establishes the authority of the Court to an extent greatly beyond what is necessary for the decision of this cause.<sup>1</sup>

From this review of the English authorities, there can be no doubt, that the Municipal Courts of England will, upon a principle of the law of nations, in the case of a stranger, domiciled abroad, and having property in England, distribute that property, in case of death, by the laws of his own country. And so the law is explicitly laid down by one of their best elementary writers.<sup>2</sup>

I have made some researches in the works of foreign jurists, for the purpose of ascertaining, what is the practice of nations governed by the civil law. Those researches have not been very satisfactory ; but they leave little room to doubt, that foreign tribunals sustain suits to enforce distribution of assets collected there under auxiliary administrations upon the doctrines so familiar in those Courts, that the *situs rei*, as well as the presence of the party, confers a competent jurisdiction.<sup>3</sup>

Upon the whole my judgment (though delivered with the greatest deference for a different judgment entertained by others) \*430 is, that a Court of Equity here has authority to decree \* distribution in cases like the present, according to the *lex domicilii*, upon the application of the legatees, or the next of kin or other

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<sup>1</sup> Vide *Nisbett v. Murray*, 5 Ves. R. 149. *Chetham v. Lord Audley*, 4 Ves. Jr. R. 72.

<sup>2</sup> Cooper's Plead. Eq. 123.

<sup>3</sup> 2 Hub. P. 2, Lib. 5, tit. 1, § 48. 1 Hub. P. 1, Lib. 3, tit. 13, § 20, *sub finem*. 1 Domat, 531, note. Constit. Frederii. Imp. tit. 1, § 10. Bynk. Quest. Priv. Jur. Lib. 1, ch. 16.

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competent parties ; that whether it will decree distribution must depend upon the circumstances of each case ; and that it is incumbent on those, who resist the distribution, to establish in the given case, that it may work injustice or public mischief. This doctrine is, as I think, sustained by principles of public policy, and is perfectly consistent with international comity. It stands also commended by its intrinsic equity. And although the authorities are not uniformly in its favor, yet they leave the Court at liberty to pronounce that judgment, which, if the question were entirely new, it would be disposed to entertain.<sup>1</sup>

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<sup>1</sup> Vide Toller's Law of Executors, 387. 1 Woodes. Lect. 384, 385.

# CIRCUIT COURT OF THE UNITED STATES.

**Fall Circuit.**

MASSACHUSETTS, OCTOBER TERM, 1818, AT BOSTON.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. JOHN DAVIS, District Judge.

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## THE BRIG HOLLEN AND CARGO, ANDREW OGDEN AND OTHERS CLAIMANTS.

The Circuit Court has no jurisdiction in causes of admiralty and maritime jurisdiction, except over the *final* decrees of the District Court. If such final decree be not appealed from, no appeal lies upon any subsequent proceedings upon the summary judgment rendered on a bond for the appraised value, or upon an admiralty stipulation taken in the cause, to enforce the decree. The proceedings in such cases, and the awarding of execution, are incidents exclusively belonging to the Court in possession of the principal cause.

After a final decree of condemnation unappealed from, in a cause of seizure by a collector for a breach of the revenue laws, the Secretary of the Treasury has no authority to remit the Collector's share of the forfeiture. It is a vested and absolute right.

**A**N information upon a seizure, by the Collector of Portland, was filed in the District Court of Maine, on the 6th day of July, 1813, against the Brig Hollen and certain parcels of goods on board, for an alleged importation of the same goods into the United States, contrary to the non-importation acts then in force. The cause was duly entered at the succeeding September Term of the Court, and was continued from Term to Term until May Term, 1817, upon the application of Mr. Ogden and others, the claimants,

\*to enable them to apply to the Secretary of the Treasury for a remission of the forfeiture. In the intermediate time, to wit, on the 13th day of June, 1814, the District Judge transmitted a statement of facts to the Secretary of the Treasury. But no remission having been actually obtained, the District Court at the said May Term, 1817, due proclamation having been made, and no person appearing to claim the brig or the goods, proceeded to decree the same forfeited; and, farther, ordered the appraised value of the property (which had been delivered on bail) to wit, \$ 22361.75 to be paid into the Court within twenty days, with the costs of prosecution. This sum not having been paid into Court pursuant to the decree, it was, at September Term, 1817, decreed by the Court, that judgment be rendered on the bond, which had been given for the appraised value by Andrew Ogden, Abraham K. Smedes, and Thomas C. Butler, and that execution issue against them accordingly. Afterwards, to wit, on the 9th day of February, 1818, the Secretary of the Treasury granted a remission of "all the right, claim, and demand of the United States, and of all others whomsoever to the said forfeiture," upon the payment of the duties, costs, and charges, and of five hundred dollars to be distributed among the Custom-House Officers, in the proportion prescribed by law. The execution having been returned unsatisfied, an alias execution issued, which was also returned unsatisfied. Messrs. Ogden and others, the parties to the bond, at the February Term, 1818, applied by petition to the District Court, stating the preceding facts with a profert of the remission, and alleging their willingness to comply with the terms of said remission, and praying, among other things, that the execution heretofore issued in the premises might be superseded, and that execution might thereafter be stayed on the bond and judgment aforesaid. To this petition the District Attorney appeared, \*and, reserving the rights of the Collector and other \*433 officers of the customs in the premises, made no objection, so far

as respected the United States to the prayer of the petition. The Collector and surveyor of the customs of Portland also appeared and filed an allegation, stating the condemnation, and denying, that any remission had been made by the Secretary of the Treasury until after the condemnation; denying also, that at the time of the condemnation any proceedings were pending before him for a remission; and alleging, that the proceedings, on which the remission was had, were not transmitted to the Secretary of the Treasury until after the condemnation. The allegation farther stated, that by the condemnation a moiety of the forfeited property became absolutely vested in them; and no appeal ever having been interposed, the decree of condemnation remained in full force, and the Secretary of the Treasury had not, by law, any authority whatsoever to remit the said moiety.

It further appeared in evidence, that copies of the original papers for a remission were, in fact, transmitted to the Secretary of the Treasury by the District Judge, in June, 1814; and that afterwards, about the latter part of July, 1816, the then Secretary of the Treasury (Mr. Dallas) returned said proceedings to the District Court, among several others, with this memorandum on the wrapper: — "I think the petitioners had better apply to Congress. A. J. D. 29th June, 1816." The original proceedings thus returned, remained in the District Clerk's office until some time in July or August, 1817, when the attorney of Mr. Ogden applied to him for the copy of Mr. Ogden's petition and statement thereon, and obtained it; but no copy of the original petition and statement, or either of them, was ever, after said proceedings were returned as above stated, transmitted by the \*434 District Clerk to the Secretary \* of the Treasury, or ever directed by the District Judge to be transmitted.

The District Judge, after a summary hearing upon the petition and defensive allegation, continued the cause for advisement; and at September Term, 1818, decreed, that the petitioners



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should take nothing by their petition, and that they should pay the costs of the application, taxed at \$ 33.18. From this decision an appeal was claimed and allowed to the Circuit Court.

The case was shortly spoken to by *Prescott* for the appellants, and by *W. P. Preble* for the respondents.

STORY J. If this cause were regularly before this Court, I do not perceive, how we could grant the petitioners any relief. The case is not distinguishable, in principle, from that of the *Margaretta* ;<sup>1</sup> and I see not the least reason to change the opinion, which was then expressed. There are some circumstances also in this case, which bear more unfavorably, in point of law, upon the claimants than in that. The principal question is, whether, after a final decree of condemnation, the Secretary of the Treasury has authority to remit the Collector's share in the forfeited goods? I understand the doctrine of the Supreme Court to be, that the right of the Collector to forfeitures *in rem* attaches on the seizure, and is consummated by the condemnation.<sup>2</sup> If this be true, then, by the condemnation, it becomes an absolutely vested right ; and the Secretary of the Treasury has no more power to divest this absolute right before, than he has after the forfeited property is distributed. It would be a monstrous proposition to assert, that the Secretary of the Treasury might, at any time, and even years after the forfeiture was distributed, by his remission, \* recal the whole property from those, \*435 to whom the law had absolutely given it. Such a doctrine might, perhaps, well suit the character of an arbitrary despotism ; but in a government, like ours, it could not be established, but upon the ruins of all the principles, which regulate civil rights. The notion, that the receipt or non-receipt of the money under the

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<sup>1</sup> 2 Gallis. R. 515.

<sup>2</sup> *Jones v. Shore's Executors*, 1 Wheaton's R. 462.

decree of condemnation could make any difference in the Collector's right, has been expressly repudiated by the Supreme Court.

But it is unnecessary to entertain these questions, for I am very clear, that this Court has no jurisdiction upon this appeal. The Judicial Act of 1789, ch. 20, § 21, enacts, that "from all final decrees in a District Court, in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars (now altered to fifty dollars) exclusive of costs, an appeal shall be allowed to the next Circuit Court to be held in such district; provided, nevertheless, that all such appeals from final decrees as aforesaid, from the District Court of Maine, shall be made to the Circuit Court next to be holden after each appeal in the District Court of Massachusetts" The final decree of condemnation, in this case, was rendered at the May Term of the District Court of 1817, and for want of a claim; and no appeal was made, or indeed could under such circumstances be made to the next Circuit Court. That decree, then, is not subject to our revision. The subsequent proceedings upon the bond for the appraised value, and the issuing of the execution, were but incidents to the original cause to enforce the decree of condemnation. And it has been long since settled, that this Court has no jurisdiction over the proceedings on the bond, which is but an admiralty stipulation, unless it has possession of the cause, to which it belongs.<sup>1</sup>

- \*436 \* But even if an appeal would lie upon the summary judgment on the bond, when no appeal had been interposed from the decree of condemnation (which, in point of law, cannot be admitted); yet this would not help the present case; for the judgment was rendered at September Term, 1817, and no appeal was then taken to the next, which was the only Circuit Court, which could take cognizance of such an appeal. Then, as to

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<sup>1</sup> *M'Lellan v. United States*, 1 Gallis. R. 227.

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the present petition, it is but an application to the discretion of the Court to stay execution, and we have no legal right to control the exercise of that discretion. Was it ever heard of in a Court of Admiralty, that it was a matter of appeal, that the Court refused to stay its own process to enforce its own decrees? We have by law no control, except over the final decrees of the District Court, as to acquittal or condemnation. It has the sole power over its own process to execute its own decrees; and it would be a strange anomaly in our law, if one Court had rightfully the sole possession of the cause, and another Court, having no authority to inquire into the merits of the cause, could arrest the process, by which it was to be enforced. Nor is there any more inconvenience in this case than in every other, where a Court, having final jurisdiction, awards process to enforce its own judgment. It may always happen, that a possible injustice may arise; but the true remedy is in an application to the Court, which has control over the process. I confess, that I do not perceive, how the District Court could have properly acted otherwise, than it has. That, however, is no concern of ours. For the defect of jurisdiction, let the appeal be dismissed.

*Appeal dismissed.*

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Miller v. Smith.

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**\* HUGH R. MILLER v. CALEB SMITH.**

Where a sale is made of goods and they are delivered, and an agreement is afterwards made to rescind the contract, the contract is not completely rescinded until a re-delivery of the goods.

In an action for goods sold, the defendant may give in evidence, in mitigation of the damages, that the goods were of a quality inferior to what they were represented to be at the sale.

**A**SSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial it was proved, that the defendant in March last purchased of Messrs. Athearn and Williams, commission merchants of Boston, who were the consignees and agents of the plaintiff, 100 kegs of Miller's No. 3 tobacco, at eleven and a half cents per pound, at six months' credit, amounting in the whole to \$ 795.80; under an express representation, that the tobacco was as good as Messrs. Athearn and Williams had before sold to the defendant of Miller's No. 3 tobacco, and as good as the defendant had previously bought of a Mr. Reed. The tobacco was delivered accordingly; and sometime afterwards the defendant complained, that the quality of the tobacco was greatly inferior to what it was represented to be. Messrs. Athearn and Williams, upon this complaint, being satisfied, that the tobacco was not as good as they supposed it to be, and as they had represented it to be, offered to take it back again, which offer was accepted by the defendant. But before the actual return, Messrs. Athearn and Williams, having communicated the facts to the plaintiff, the latter utterly refused to rescind the bargain or receive the tobacco back again, upon the ground that No. 3 tobacco was always known to be of the most inferior quality, and never sold under a warranty. The defendant sent the tobacco to Boston, but Messrs. Athearn and Williams, under the orders of their principal, refused to receive it; and it was then sold at public auction by the defendant for \* the benefit of whomsoever it might concern, and the neat sales amounted to \$ 405.69.

The defendant at the trial insisted upon two points. 1st. That the original contract of sale was rescinded, and therefore the plaintiff was not entitled to recover in an action for goods sold and delivered. 2dly. That if the sale was a subsisting contract, still the plaintiff was not entitled to recover more than the price, at which the tobacco sold at auction.

The plaintiff on the other hand insisted, 1st. That the contract of sale never was rescinded. 2dly. That in this action the plaintiff was entitled to recover the contract price of the tobacco without any deduction; and, that if the defendant was entitled to any allowance for the supposed misrepresentation, it must be sought in a cross action, founded upon the original representation.

STORY J. There is no pretence in this case, that the representation was fraudulent. It was made, as all parties agree, innocently, under a misapprehension of the state of the tobacco, which had not been examined by the consignees. I think, that the consignees had authority to make the representation, and that the plaintiff is bound by it. When the plaintiff sent the tobacco to the consignees for sale, there was an implied authority to represent the article to be, what it was marked and described to be. The representation of the consignees went no farther than this, that the tobacco was as good as Miller's No. 3 had previously been. Now, in point of fact, the tobacco was very inferior in quality to what Miller's No. 3 usually was. And certainly if that be so, the defendant has sustained an injury by the misrepresentation, and he is entitled to a recompense, however innocently it may have been made.

As to the points of law raised in the case, I am clearly of opinion, that the contract was not rescinded. There was \*an \*493 agreement to rescind, which was never carried into effect, but was stopped by the plaintiff's interference; and as the tobacco was never received back, the original contract remained valid.

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Miller v. Smith.

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To constitute an actual rescision of the contract, there should have been a re-delivery of the goods. Until that is done, the agreement to rescind is *in fieri*.

The other point presents no pressing difficulty. Where goods are sold as of a certain quality, and they turn out to be of an inferior quality, the defendant may, in an action for goods sold and delivered, give the facts in evidence to reduce the damages; for the plaintiff is entitled to recover no more than the real value of his goods. The authorities directly support this doctrine; and there is neither reason nor justice in straining after technical objections to overthrow it.<sup>1</sup>

The auction sale is not, however, conclusive upon the plaintiff, as to the value of the tobacco. The true rule for the Jury is, to deduct from the original price the real difference in value between this and the common Miller's No. 3 tobacco; and in making their estimate, they will weigh all the evidence, and give the plaintiff, what is his just due, making all deductions.

*Verdict for the plaintiff, \$ 596.85.*

*G. Sullivan*, for the plaintiff.

*Webster and Curtis*, for the defendant.

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<sup>1</sup> Vide *Crowninshield v. Robinson*, Ante, 93.

**\*GEORGE O. VAN AMRINGE v. JACOB PEABODY AND OTHERS.**

A factor cannot pledge the goods of his principal for his own debts ; and if he does, the principal may, after a demand and refusal, maintain trover for them against the pawnee.

**T**ROVER for 1700 bushels of corn and four pipes of brandy. Plea, the general issue. The plaintiff, who resides in Philadelphia, in the course of the last spring consigned the goods in question, among others, to Messrs. Damon & Co. of Boston for sale. Messrs. Damon & Co. previous to the 11th of June last were indebted to the defendants, who are auctioneers in Boston, in the sum of 1100 dollars, for which they had deposited with the defendants, as collateral security, a note signed by Messrs. Brent and Chapin, and being desirous of getting that note for the purpose of discounting it in the market to relieve them from embarrassments, under which they were laboring, they offered on that day to deposit with the defendants 1400 bushels of the plaintiff's corn in lieu of the note, which offer the defendants accepted, and the corn was delivered accordingly. On the 17th of the same June, Messrs. Damon & Co., being in distress for more money, applied to the defendants for an advance of \$ 1000 on a deposit of the four pipes of brandy belonging to the plaintiff, to which the defendants agreed, and the brandy was delivered accordingly ; and one of the partners of the firm of Damon & Co. signed a receipt, acknowledging the advance of \$ 1000 on the brandy, as deposited for sale. On the 16th of July following, the price of brandy having declined, the defendants requested additional security for the debts due to them, and Messrs. Damon & Co. accordingly deposited with them 300 bushels more of the plaintiff's corn. At the time of the advance of the goods, Messrs. Damon & Co. verbally agreed to allow the defendants one per cent. per \*month upon that advance, \*441

and two and a half per cent. commissions for every sixty days the goods should remain. But as the parties did not at that time contemplate, that the goods would remain deposited longer than sixty days, it was supposed, that one commission only would grow due. But on the 16th of July, when the new security was taken, the verbal agreement was reduced to writing, and signed by Messrs. Damon & Co. ; and in that they expressly stipulated to allow one per cent. per month, and two and an half per cent. commission as above stated.

The defendants at the time of these several transactions, knew, that Messrs. Damon & Co. were commission merchants, and that the goods deposited with them were consigned to Damon & Co. for sale.

The plaintiff, at the time of his consignment of the brandy to Messrs. Damon & Co., limited them to the sale price of three dollars and twenty-five cents ; and they had no authority from the plaintiff to sell the goods at auction, or to procure any advances on them on the plaintiff's account ; they had no authority to act as general agents of the plaintiff, but acted as consignees under his orders.

The defendants sold the corn at private sale, with the consent of Messrs. Damon & Co., early in September ; and the four pipes of brandy at public auction, at various times, before the middle of the same month, and received the whole amount of the proceeds of both sales. Messrs. Damon & Co. failed about the 11th of September ; and the plaintiff made a demand of the corn and brandy of the defendants about the 28th of the same month.

*A. Peabody*, for the defendants, contended, that the real transaction between the defendants and Messrs. Damon & Co., was a purchase of the corn and brandy ; and that the goods were never, in fact, deposited as a pledge or as collateral security for



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Van Amringe v. Peabody et al.

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the debt due to the defendants. That \* Messrs. Damon & Co. were to be considered as the general agents, and not as limited agents of the plaintiff; and that the advance on the goods must be deemed to have been made on the plaintiff's account. That when the agent sells the goods of his principal, the buyer may deduct any debt due to him at the time of the sale, which the agent agrees to deduct; and for this he cited *Scott v. Surman*.<sup>1</sup>

*Hubbard*, for the plaintiff, on the contrary contended, that the facts in the case conclusively established, that this was a case of a pledge, and not a sale, of the goods to the defendants. That nothing was better established, than that a factor cannot legally pledge the goods of his principal for his own debts. That Messrs. Damon & Co. were not the general agents of the plaintiff; that they were mere factors in respect to these consignments, and bound to obey the orders of their principal. That the advance on the goods was never authorized by the plaintiff, nor the sale at public auction. That the agreement to allow one per cent. per month, and two and a half per cent. commissions, was grossly illegal; and it was impossible, that the plaintiff could be bound by the illegal acts of his consignees.

**STORY J.** It is extremely difficult to find any foundation in the facts of this cause, on which to raise an argument, that the goods were sold, and not pledged, to the defendants. The whole current of the evidence is decidedly the other way. Then, as to the law, it is quite too late to doubt the doctrine, that a factor has no authority to pledge the goods of his principal for his own debts. If he does pledge them, the principal is entitled to recover them \* from the person in whose hands they are pledged. \*443 Here the goods have been sold, and the proceeds received by the defendants; and, in point of law, the sale was a tortious con-

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<sup>1</sup> Willes. R. 400.

version, for which the defendants are responsible in this form of action.

There are other difficulties in the way of the defendants which seem almost insurmountable. Messrs. Damon & Co. were not, in any correct sense, the general agents of the plaintiff; they were merely limited agents or factors, as to these particular consignments. They had no authority from their principal to pledge the goods, or to sell them at auction, or to procure advances on them, or to enter into any illegal or usurious contract on his account. Their whole proceedings, therefore, were unauthorized; and the defendants well knew, that they were acting, not for themselves, but as factors. Certainly, under such circumstances, the defendants cannot resist the plaintiff's claim for a full indemnification for the loss he sustained by their acts.

*Verdict for the plaintiff for \$2,299.35.*

#### UNITED STATES v. HAMILTON AND OTHERS.

On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the Act of the 30th of April, 1790, ch. 9, it is not necessary to prove, that it was committed on the high seas. If the master of a ship, after the commencement of the voyage, be by sickness disabled from pursuing it, and a new master is appointed, the shipping contract with the seamen is not dissolved thereby.

**INDICTMENT** against the defendant for an endeavour to make a revolt on board the American ship *Courier*, against the Statute of the 30th of April, 1790, ch. 9, § 12.

It appeared in evidence, that the defendants were mariners of \*444 the ship *Courier*, and shipped for a voyage "from \*Boston for a port or ports beyond the Cape of Good Hope, one or more times, and thence to her port of final discharge in the United States." The shipping articles were in the usual printed form,

and began as follows:— “It is agreed between the master, seamen or mariners of the ship Courier, Henry Prince, Jr. master, *or whoever else may go as master*, now in the port of Boston, and bound for a port or ports beyond the Cape of Good Hope, &c. &c.” The clause in Italics was written in an appropriate blank. The ship sailed on her voyage from Boston on the 27th day of September last, under the command of Henry Prince, Jr.; and having proceeded nearly off Cape Cod, was, in consequence of the alarming and sudden sickness of the master, obliged to put back into Salem on the same day. The ship remained there two or three days, waiting for the recovery of Capt. Prince; but his sickness continuing very dangerous, the owners concluded to appoint his father, Henry Prince (who was also a part owner) the master for the voyage. Accordingly, one of the principal owners went on board with the new master, stated the circumstances to the crew, and requested them to unmoor the ship, which then lay in the main stream of Salem harbour, that she might proceed to sea. The seamen utterly refused; and declared, that they considered that their contract bound them only to go with the original master, and that by his inability they were discharged from all further obligations to the ship. Every effort was made to persuade them to return to duty, but they obstinately refused, and remained by themselves in a state of open mutiny. It became necessary, at last, to seek the interposition of a civil officer to arrest some of the leaders; and when he came on board a scene of great confusion ensued, in which the seamen acted together, and opposed with force every attempt to arrest any of them, or to reduce them to obedience; and the officers were obliged to protect themselves by resorting \* to their muskets and \*445 other weapons. Two of the defendants were among the principal ringleaders; and after a considerable struggle they were carried to prison. On the next day two of the defendants offered to return on board the ship; but Davis, the other one, remained obstinate in his refusal.

*S. L. Knapp*, for the prisoners, contended, 1st. That the offence was not cognizable in this Court, it not being committed on the high seas, but in Salem harbour. 2dly. That the shipping articles were dissolved by the change of the master, and the seamen were not bound to go the voyage under a new master; and he likened it to the case of an apprenticeship, where, by the death of the master, the indentures are dissolved.

*G. Blake*, the District Attorney for the United States, was stopped by the Court.

STORY J. The Court do not admit the validity of either of the grounds assumed in this defence. The 12th section of the Act, on which this indictment is founded, does not limit the offence to the high seas. It declares, that "if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship, such person or persons so offending, &c. &c." The argument is, that because certain other offences, enumerated in the preceding part of this section, are limited to the high seas, or the seas, therefore the same limitation should be constructively given to this clause. We have no authority to interpose any such limitation, unless the preceding connexion necessarily requires it, which it certainly does not. The clause in controversy is introduced by the disjunctive "or," and contains an enumeration of new substantive offences; and as \*446 the mischief is the same, whether the \* offences be committed in port or on the seas, we see nothing in the language, or in the policy of the law, to justify us in inserting a new restriction into the Statute.

As to the other point, it would be sufficient to say, that the very terms of the shipping articles remove the whole ground of argument. The words are, "*Henry Prince, Jr. master, or whoever else shall go as master.*" How then can we say, that the contract is dissolved, when the very case, which has arisen, is

specially provided for? But we are clearly of opinion, that even without this clause the same rule must prevail. The shipping contract is not dissolved by the substitution of a new master, in consequence of the sickness or death of the first master, during the voyage. It would be most disastrous to the interests of commerce, and to the interests of seamen themselves, if such a construction should prevail. The contract, though made by the master, is, in fact, a contract with the owners for the voyage; and it is not in the power of either party to put an end to it by the mere substitution of a new master. There is no implied condition, that the contract shall be void, unless the master, who makes the contract, continues to be master during the whole voyage.

The case of apprenticeships does not apply. That stands upon principles of public policy and personal confidence, which do not enter into the general contract of hire, either of mariners or of other persons.

Could it be contended for a moment, that the contract for wages was dissolved by the death of the owner during the voyage? And yet he is as much a contracting party as the master. If the evidence is believed, and it is wholly uncontroverted, there is no doubt of the legal guilt of the prisoners.

*Verdict for the United States.*

**\* BARRETT & STEARNS v. HALL AND OTHERS.**

A joint patent may well be for a joint invention, but not for a sole invention of one of the patentees. If each of the patentees obtain separate patents for the same invention, as his exclusive invention, and afterwards both obtain a joint patent for the same, as their joint invention, they are estopped by the joint patent to assert any title under the several patents.

A patent may well be for a new combination of machines, whether the machines be old or new. But one patent cannot, at the same time, include an exclusive right in the combination and in each of the machines; and it is no infringement of a patent for the combination, to use either of the machines separately.

There must be several patents for several improvements of distinct machines.

A patent for an improved machine must show in the specification, in what the improvement precisely consists; and the patent be limited to those improvements. If not specified, the patent is void for ambiguity; if broader than the improvements, it is void on other grounds.

Where a combination of machinery exists up to a certain point, and the patentee makes an improvement, he should not include in his patent the whole machinery; but only the improvement.

If a party make an improvement on an existing machine, or invent a new machine, his patent should not be for a method, but for his machine, or improved machine.

**CASE** for the infringement of a patent, granted for "A new and useful improvement, being a mode of dying and finishing all kinds of silk woven goods." Plea, the general issue, with a specification of special matter of defence.

The patent was granted on the 9th day of September, 1818; and after reciting, that the plaintiffs had alleged, that they had invented "a new and useful improvement, being a mode of dying and finishing all kinds of silk woven goods," granted to the plaintiff "the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement, a description whereof is given in the words of the said Abner Stearns and the said William Barrett themselves, in the schedule hereto annexed, and is made a part of these presents," for the term of four years from the 12th day of May, 1818. The specification, annexed to the letters patent, con-

\*448 tained a description of two machines; one a reel, \*on which

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spirally to wind and secure the silk, and put it into the dye ; the other, a frame for the purpose of extending and finishing the silk, after it is dyed.†

\* At the trial it was admitted, that the infringement of the plain-tiffs' patent, if any, was by the use of the reel only ; and that the \*449

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† SPECIFICATION. The reel is designed to extend the silk, when immersed in the dye-stuff, so that this may pass freely and come in contact with the whole surface of the silk or material to be dyed, and yet the silk, or material, shall occupy the smallest possible or convenient space in the dye-tub.

This machine consists of two sets of arms, each resembling in form the hub and spokes of a wheel, without the rim or fellies. In the hub of one is formed a female screw ; in the other, a smooth cylindrical hole, in which one end of the axle may freely turn. The axle consists of a male screw, except that one end thereof is turned smooth to adjust to the whole of the hub that is smooth, and the other end is for an inch or two square, to receive the eye of a winch or crank. It is about three or five feet long. The male screw of the axle is cut, to fit the female screw in the hub, having the same therein. The two sets of arms are besides connected with each other by two square bars of wood or metallic substance like the axle. One end of each is securely fixed to the hub having the smooth hole, and the other ends are adjusted to square holes made in the other hub, through which they slip or pass as the hubs or set of arms are made to approach each other, and thus prevent the hubs from turning, as the screw axle is turned round for the purpose of approximating or withdrawing the sets of arms, to or from each other. Thus it is easy to perceive, that with one set of arms held on to the smooth cylindrical end of the axle, by a pin and washer or otherwise, so that the axle may freely turn therein, or in the hub thereof ; the other set of arms, having the female screw, will be made to approximate to or recede from this, as the screw axle may be turned to or from, by a handle or winch affixed to the square end of the axle. The utility of this movement will presently appear.

The hub of the sets of arms may be made of any convenient size. The dimensions adopted in practice at present are as follows : — The

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defendant did not use the silk frame, either in connexion with, or separately from, the reel. The plaintiffs stated their improvements to consist, 1. In the spiral winding of the silk on more \*450 arms than four arms, so as to \* assume the shape of a circular spiral, instead of a square spiral. 2dly. In the use of small pins,

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material any metal or metallic composition. The last, however, has been adopted in practice. The hub is about five inches in diameter, and two inches through; is morticed to receive the arms, which are flat square about sixteen inches long, but tapering from the hub to the end; and upon the sides of these arms or spokes are secured small brass pins, which are so set in grooves, cut into the sides of these arms transversely and diagonally, that the pins point inward and upwards, and divergently from the axle. The distance between these pins is quite small, about three-sixteenths of an inch. The mode of applying the silk and immersing the same, is as follows:— Both sets of arms, being placed on the axle as above represented, the machine is supported by the axle on two standards outside of the arms horizontally. The set with the female screw is then approximated by turning the winch to a distance from the other, a little less than the width of the material to be dyed. One end of the silk is then attached by the operator to opposite arms upon the pins therein nearest to the axle, and then the operator turning the machine a little for himself, the silk is further attached to the next arms by the pins nearest to the axle, and so on successively till the whole is attached and wound round upon the machine in a spiral form. Then turning the screw axle by the winch, the set of arms having the female screw therein, recedes by a regular motion susceptible of the most accurate adjustment to the width of the silk; and thus it is held perfectly extended between the arms and by the selvages, in such a manner as not to be in contact with itself, but to leave free passage for the dye-stuff to apply itself equally to every part of the whole surface; and in this state of tension it is immersed by operation of a tackle and fall attached to one end of the axle until it is properly saturated or dyed.

It is obvious, that the silk by this means may be most conveniently rinsed, and most readily drained. Also it is apparent, that the position of the pins on the arms, they inclining upwards and bending a little



obliquely placed on the arms of the reels, to hook the selvages of the cloth, and hold it in a spiral form. 3dly. In separating the opposite arms gradually, by the means of a screw, and thus gradually extending the silk. 4thly. In the use of side bars to

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from the operator, as he applies the silk, must facilitate both the application of the material for dying, and the disengagement thereof after this operation is performed.

*There has been, it is said, a reel heretofore in use for like purpose ; but this, if it ever were so used, consisted of four arms or two cross pieces, adjusted to a square axle, and the set of arms were kept separate or fixed upon the axle, not by a screw, but by pins passing through holes in said axle. Instead of pins affixed to the arms, there were common tenter hooks driven into the inner side of the arms, and the whole so constructed as to be utterly inapplicable to the purpose of dying silk or other goods, without great injury. The machine for which these applicants claim a patent, is, in all material respects, an improvement upon this.*

The design of the silk frame is to extend the silk for drying and finishing ; and it is contemplated to use it for all kinds of goods, which, in the operation of dying, require to be so extended.

It is a wooden frame, consisting of fourteen posts, about four feet or more in height, connected by rails in such a manner, as to be perfectly solid and firm. The opposite posts are connected by two strong rails of about eight feet in length, one at the bottom, and one within a few inches of the top, well morticed and tenanted into the posts ; while two strong pieces of plank lying upon the bottom connecting rail, leaving a space of about two feet more or less between them, one firmly secured to these said bottom rails. A strong rail is fastened to the posts throughout the whole length of the frame, and thus gives it all the requisite solidity and firmness. Upon the upper rail connecting the opposite posts, which are placed at a distance of ten feet from post to post along the length of the frame, are lain two pieces of plank sixty feet long, and about eight or ten inches wide. These are made to move or slide in these upper rails, so that when the silk is attached to their inner edges, they may be withdrawn from each other, till the requisite degree of tension is obtained.

The mode, in which the silk is attached to the edges of these cheeks,

sustain \* the screw, and prevent it from turning with the machine, when it was not wished.

It appeared in evidence, that reels with four arms had been used before the granting of the patent, with tenter hooks (instead of pins) to wind the silk on in a square spiral. And the use of

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and then the cheeks withdrawn, is as follows:—The inner edges of the cheeks are covered by a thin plate of copper, about half an inch wide, nicely attached thereto. Sixty pieces of wood, cut from board or plank, say, from an inch to an inch and a half, or two inches thick, about a foot long on one side, and cut up in a triangular form, are adjusted to each cheek. The base being, as above, one foot in length, it is attached by hinges to the superior surface of the cheeks, in such manner, that the edge of the base will coincide exactly with the inner edge of the cheek, when the piece rests on its base. On this too there is a copper edging, and thus, this copper edging, when these pieces are raised upon their basis, comes closely in contact with the copper edges along the line of the inner edges of the cheeks, and by firm pressure are made to hold the selvages of the silk, &c. To the outer side of these pieces, which are called lap-joints, are attached some iron stays, about six or eight inches long, being a little longer than the lap-joints are wide or high. These stays are attached by a staple, or eye, to the upper part of the lap-joints, and the foot of each is made to slide into a groove, cut in the superior surface of the cheek, and lined with copper, so that by forcing the foot of the stay into the groove, the lap-joint is made to press firmly upon the selvage of the silk, when lain upon the copper edge of the cheek. The silk is first secured by one selvage to one cheek; then the other cheek being approximated sufficiently, the operator in like manner applies the selvage to the other cheek edge, and secures it by successively raising up and securing the lap-joints. The former cheek is fastened to the upper rail by strong iron pins passing through this and the said connecting rails of opposite posts. The other cheek, which is called the front cheek, is then gradually withdrawn till the silk is perfectly extended. The mode of withdrawing the front cheek is thus: To this cheek opposite to each post, all of which, on this side, rise two feet above the cheeks, are attached several pieces of iron, long enough to pass through the posts, on which pieces of iron are

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a screw, for the purpose of gradually separating the opposite arms, was described in a book printed in London, in the year 1789, entitled the "Art of Dying Cotton and Linen Thread; together with the Method of Stamping Silk, Cottons," &c. p. 501. — "Square vats are therefore constructed, about six feet

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cut screw threads, so that nuts, being set in wheels and applied to said pieces of iron, by the turning of all the wheels simultaneously and with equal velocity, the whole front cheek is gradually withdrawn till the proper degree of tension in the silk is obtained. These wheels are put in motion by a chain band carefully adjusted, so that the links thereof embrace projections in the periphery, and the power is applied indifferently to either wheel, by a pin six or eight inches long thereto attached, to serve as a handle or winch.

*There may be other modes of withdrawing the front cheek, but the special subject of patent, for which letters are claimed, is the mode of securing the silk as above described by lap-joints, and the gradual and exact tension obtained by the withdrawing of the whole front cheek simultaneously and equally at one operation as aforesaid. In these and in all material respects, this frame is an improvement upon the pin frame formerly in use, and also a frame, that was constructed to hold the selvages by pieces of board lain flat upon the cheeks, and pressed by wooden screws attaching them to the cheeks. The copper edges being a very considerable improvement on this last mentioned frame, which had become useless by reason of the absorption of the dye-stuffs in the wooden edges of the cheeks, and slabs or boards above mentioned.*

The silk being thus extended, the ends thereof are secured by a cross bar set with pins, or by a piece of wood split so as to hold the ends, and the whole is ready for the operation of drying and finishing, which is done thus: Upon the pieces of plank, which are described as fastened upon the lower cross rails, that connect opposite posts, is placed a moveable car running on four wheels, which is made to contain coals and move at pleasure beneath the silk, as the operator proceeds in the finishing. This being accomplished, the silk is delivered from the lap-joints by removing or sliding away the stays, and may be immediately folded for use.

deep, and three and a half wide, and about three feet in the ground, for the conveniency of the dyer. The cloth is then fixed by the selvages to two wooden frames, each composed of four bars, and of such a length, as to be easily moved backward and forward in the vat. *These frames are held together by means of a screw, so as to be easily let out or taken in, according*  
\*452 *to the breadth of the cloth.* The cloth is \* supported by little iron hooks, passed through the selva<sup>ge</sup> at the opposite sides, to keep it as it were in folds throughout the piece.

“The whole thus arranged is suspended with a pulley over the vat, by means of cords fixed to each corner of the frame, and uniting in the middle, so that by slackening the pulley, the linen is dipped without being rumped. When necessary to air and ungreen, by drawing the pulley the frame rises, and the cloth drains into the vat.”

The witnesses at the trial gave different opinions as to the exact form of the machine, which was intended in this description; and all seemed to think it somewhat ambiguous. But the fact, that the screw was to be used, as in the plaintiffs' reel, was agreed on all sides. The reels, in fact, used by the plaintiffs had eight arms. The reels used by the defendants had ten arms. Instead of pins, the defendants used on their reels staples, with a short barb to catch the silk in the first instance; and the silk was then secured on the reels by a rod running through the selva<sup>ge</sup>, and through the holes in the staples. Instead of a screw, the defendants used a rack and pinion (which, it was admitted on all sides, was a different mechanical power) to separate the opposite arms after the silk was on the reel. In the spiral winding of the silk, the reels of the plaintiffs and the defendants were alike. Some of the witnesses were of opinion, that the reels were alike in what they called principle; others were of an opposite opinion. All of them, however, agreed as to the specific agreements and differences between them. It farther appeared in evidence, that

in the year 1809, the plaintiffs severally obtained patents from the Department of State for the same invention, each of them then claiming and swearing, that he was the sole inventor ; and neither of these patents had ever been repealed.<sup>1</sup>

\*The jury found a verdict for the plaintiffs. And a motion for \*453 a new trial was made by *Gallison* and *Prescott* for the defendants, upon the following grounds :

1st. Because if the patent, which is declared upon in this action, be construed as a patent for the entire machine, called a reel, described in the specification, then the same includes parts, which at the trial were proved, and in the said specification are admitted to have existed, in combination in a machine for similar purposes, long before the supposed invention of the plaintiffs, to wit, in the reel composed of four arms, or two cross pieces, on which it was admitted, that the cloth was wound in a square spiral, which reel is described in said specification as before in use ; and the Judge, who charged the jury at the trial of said issue, did direct them, that merely increasing the number of arms was not an invention, that would in law entitle the plaintiffs to a patent, no certain number of arms being claimed in said specification ; and did also direct them, that as it respected this patent, if the former square reel was believed to have been in use before the invention claimed in this patent, the defendants had a right to use the reel-head, resembling the hub and spokes of a wheel, and also the spiral form of winding the cloth ; and that the said patent, if it extended to the whole machine, and went to secure the exclusive right to every part thereof, as the invention of the plaintiffs, was broader than their invention, and therefore void. And therefore the said jury, upon this construction of the patent, in returning their said verdict, must either have found, that the

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<sup>1</sup> *Stearns v. Barrett*, vide ante, 153

said square reel did not so exist, which is against the admission of the specification, and the admissions and evidence of the plaintiffs at the trial ; or, admitting the above fact, they must have gone upon the supposition, that notwithstanding such prior use, \*454 the same might be secured by patent to the plaintiffs ; and \* that their said patent was not thereby rendered void ; in which case their said verdict is against the direction of the Judge in the matter of law.

2dly. Because, if the said patent be construed as a patent for an improved machine, or for a certain combination, consisting of the machine known and used before, as set forth in the specification, and of certain improvements added thereto by the plaintiffs, then the right of the plaintiffs under their said patent, must be confined to that precise combination ; and it was necessary, in order to support the plaintiffs' case, and the Judge, who tried the cause, did so direct the jury, that the machine used by the defendants should, in all material and essential respects, be like the machine described in the plaintiffs' specification ; otherwise the combinations would not be identically the same, and therefore there would be no infringement ; and that, if the rack and pinion was an essentially different mechanical power from the screw, then there appeared a substantial difference between the two machines, which destroyed their identity ; and therefore, inas-much as it was evident on inspection, that the rack and pinion was employed in the defendants' machine to produce the same effect, for which the screw is employed in the plaintiffs' machine, and it was also proved by divers witnesses on both sides, and was not contradicted, that the rack and pinion is a mechanical power essentially different from the screw, the said jury must have returned their verdict in this particular, either against the evidence or against the direction of the Judge, in the matter of law.

3dly. Because, at the said trial, it was clearly proved by the testimony of Allan Pollock, by the admission of the plaintiffs and by a public work, that hooks of different form and sizes, and of different degrees of finish and fineness, according to the nature of the cloth, had been used for the purpose of extending cloth upon frames, many years \* before the pretended invention of \*455 the plaintiffs; and this evidence was not contradicted by any other evidence in the cause.. And it was also proved by the said public work, and by witnesses produced, both by plaintiffs and defendants, to show the meaning of the description contained in the said public work, and was not contradicted by any other evidence in the cause, that many years before the said supposed invention of the plaintiffs, the screw axis was known, and had been used and applied for the purpose of moving one frame from or towards another, according to the width of cloth attached to said frames to be dyed. And it also appeared, and was admitted by the said plaintiffs in their specification, that before their said supposed discovery, a reel was in use for like purpose, consisting of four arms or two cross-pieces; and it also appeared and was admitted, that on such reel the cloth was wound in a square spiral, by means of tenter-hooks set upon the arms; and there were no other improvements claimed to have been made in any essential parts upon the said square reel, admitted by the said specification to have been before in use, excepting only the increasing of the number of arms, (which the said Judge directed the jury was not an invention, that would in law entitle the party to a patent, no certain number being set out in said specification; and as to which, it appeared from inspection of the machine used by the defendants, that it consisted of eight arms only, while the machine produced by the plaintiffs consisted of ten,) the using of finished curved hooks, placed diagonally in the sides of the arms instead of tenter-hooks formerly in use, and the aforesaid application of the screw. And the said Judge directed

the Jury upon these facts, that if any or all of these improvements had been used by the defendants, yet if none of the same was new in its principle or mode of application, the plaintiffs could not, in point of law, support their action for such use ; and \*456 therefore the \* said verdict, in this respect, is either against the evidence, or against the direction of the Judge in the matter of law.

4thly. Because it appeared in evidence as aforesaid, and was not contradicted by any testimony, that the screw had been applied for stretching cloth between two frames, in the same manner as in the plaintiffs' machine, long before the supposed discovery of the plaintiffs ; and the said Judge directed the Jury, that, taking this fact to be true, if the said patent was construed as a patent for the improvements made in said square reel by the plaintiffs, then the said patent included, what was not invented by the plaintiffs, to wit, the said application of the screw, and, therefore, upon this construction of the patent, the said verdict is against the evidence, or against the direction of the Judge in the matter of law.

5thly. Because at the said trial it was proved by an inspection of the machines, that the power, which moved the moveable frame or reel-head in one was a screw, and in the other a rack and pinion ; and it was also testified, and was not contradicted, that these are essentially different mechanical powers. And it also appeared, by inspection of said machines, and from divers witnesses, whose testimony was not contradicted, that the cloth upon the defendants' machine is secured to the arms by rods passing through staples, and through the selvages of the cloth ; and that the purpose and design of certain small barbs, cut upon said staples, is merely to hold the cloth until the rods are pushed through ; and it also appeared, that said staples and barbs resembled more the tenter-hooks, admitted to have been long in common use, than the hooks or pinion of the plaintiffs' machine ; and it also appeared, that in the plaintiffs' machine the cloth is



attached and secured by means of curved hooks, or pins passing through the selvages, and holding the cloth through the whole operation of dying; and it also appeared, that these two parts of the machine \* were the only essential parts, which had been im- \*457 proved by the plaintiffs, no other improvement being set out in their specification. Wherefore the said verdict is against the weight of evidence and also against law, in finding the said defendants guilty of an infringement of the plaintiffs' rights.

6thly. Because the said Judge, in charging the Jury, did direct them, for the purposes of this trial, that the existence of two prior patents for the same thing, granted to the same patentees respectively, although both of said patents be still in force, did not affect the validity of the patent declared on. And did also direct them, for the purposes of this trial, that the oaths of said plaintiffs respectively made when they obtained the said prior patents, that they severally believed themselves to be true and original inventors of said machine, did not conclude them to show a joint invention of the same machine, and to claim as joint patentees therefor, both which directions the said defendants respectfully submit are incorrect in point of law.

7thly. Because the said Jury, upon the whole weight of evidence produced at the trial, and upon the matters of law, in which they were instructed by the Judge, ought to have returned their verdict, that the defendants were not guilty; yet, against the said weight of evidence, and against the said directions in matters of law, they have returned their said verdict, that the said defendants are guilty.

*G. Sullivan*, for the plaintiffs, argued *e contrà*.

Our Statute differs materially from the Statute of James. Under the Statute of James the inventor applies for, and obtains a patent, in which is contained a description, comprehending his whole invention. But a proviso is inserted in the patent, re-

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quiring the inventor to file in chancery a specific and minute statement of what he claims as his invention. This specification is matter of record in chancery ; and whether this describes less \*458 than is contained in \*the patent, may well be considered, in many cases, as mere matter of law. Hence it happens that the question, whether the patent is broader than the invention, is sometimes in England decided by the Court. So also, under the Statute of James, the Court determines what is principle, or that character, which essentially constitutes the difference or identity of machines.

But in both these particulars, the patent law of the United States makes express provision. In respect to the principle of a machine, the Statute expressly defines principle or character to be that thing, whatever it may be, whether it be found in structure or operation, or modes of operation, whereby the alleged invention may be distinguished from all others. Hence the Courts of the United States are not required to define principle. Nay, they have no power to direct the Jury, that this, or that, or other structure, constitutes the character of a machine, whereby it is distinguished from all other inventions. The Judges, as I apprehend the law, must admit all evidence offered by either party, from witnesses acquainted with the particular art or machinery in question, whereby the true character or distinguishing principle of the machinery may be proved. And then they are to put it to the Jury as a mere matter of fact, to determine upon evidence, what constitutes the distinguishing principle of the machines in question before them, and whether that distinguishing principle, be it in structure, operation, or mode of operation, do or not exist in both machines, so as to constitute them essentially the same or different. If this were not so, the Judges would draw to themselves the decision of matters of fact ; for surely the question, what it is that constitutes the distinctive character of a machine, whereby it is distinguished from all others, is plainly matter of

fact ; and it cannot be disputed, that whether this same principle do or not exist in the plaintiffs' and defendants' machines, is also \* mere matter of fact. So, whether the patentee have invented \*459 any thing that is new and useful, is merely a question of fact ; for otherwise the Court must determine, what has existed before ; for what has existed before must be shown in evidence, or the Court must be presumed, nay required to know ; and surely what has existed, is, beyond all controversy, matter of fact. Suppose the defendants insist, that the patent is claimed for a bare philosophical principle. This in like manner must be referred to the Jury, unless mechanical philosophy be law, and as such be presumed to exist in the breast of the Court. So if there be a question, whether the description specified be sufficient to enable artists to manufacture the machine, the sufficiency or insufficiency is matter of fact to be given in evidence by artists, or the Court must assume to itself a paramount knowledge of all arts and manufactures, and in doing so, assume the decision of mere matter of fact. Nay, as I apprehend the law, if there be evidence on both sides, the Court have not the power to determine on which side the weight of evidence appears, this being exclusively within the province of the Jury ; and the Court have no power in such a case to set aside a verdict, merely because they think the verdict is against the weight of evidence. So also if there be a patent for an improvement in a patented invention, and the question arise under the second section of the Patent Law, whether the alleged improvement be simply a change in the form or proportions of a machine, this is clearly a question of fact to the Jury. In like manner, all the questions arising under the sixth section, whether the specification do or not contain the whole truth relative to the discovery ; whether it contains more or less than is necessary to produce the described effect, and so made for the purpose of deceiving the public ; whether the thing described in the patent was or not originally

discovered by the patentee, or had been in use before ; whether  
\*460 \* the invention had been described in some public work, anterior  
to the supposed discovery of the patentee ; all these are mere  
questions of fact, and such the Statute expressly makes them,  
when it denominates the subject of these questions special matter,  
and provides that it may be given in evidence, if notice thereof  
be filed thirty days before the trial. Thus it appears, that what-  
ever may be the practice of the English Courts under the Statute  
of James, in relation to the extent of the patent beyond the inven-  
tion, it is clearly matter of fact here, whether the patent contain  
more than the invention, that is, in the English technical phrase-  
ology, whether the patent be or not broader than the invention.  
And this brings us to the other point of difference, between our  
Act of Congress and the Statute of James, which respects the  
power of the Court to decide, if the patent is broader than the  
invention. And here it is only necessary to remark summarily  
after what is said above, that if the decision of the question is  
drawn to the Court in England, it is merely a question of fact  
in this country, and as such to be determined by a Jury upon  
evidence.

In this place it may be pertinent to consider, what evidence is  
to be received, touching the difference or identity of machines.  
Certainly it is not to be expected, that the Court should be in-  
formed upon all the principles of mechanics, nor, if they were, is  
it to be allowed, that their direction to the Jury on these matters  
of fact can be regarded as more imperative than in other cases  
of fact. If there be a question of seaworthiness of a ship, the  
Court may well lay down the rule, that the vessel must be capa-  
ble of performing the voyage insured. But after it is proved the  
vessel was defective in certain of her timbers, it surely is compe-  
tent to both parties to adduce evidence to show, that these de-  
fects do or not render the ship incapable of performing the  
\*461 voyage. And whatever may be the private \*opinion of the

Court, they must submit the question to the determination of the Jury, upon the evidence produced. So in questions of deviation, and many others of the like kind.

Now in the case before the Court, the question of the identity of the machines was a mere matter of fact. It was testified, that they had the same character, and were in principle the same. There was evidence to this point on both sides, and the jury found their identity. They were in fact the same. The substitution of the rack and pinion, it will appear, when the nature of mechanical powers is considered, makes no difference. What are mechanical powers? They are only the means of augmenting the force applied, and this is uniformly done in the inverse ratio of the velocity of that force. These powers are common to the whole mechanical world, and no patent can be obtained for the application of them as powers. But the patent goes for that new and useful structure of constituent parts, whereby the powers being applied, certain new and useful effects are produced. Now what was this structure of essential constituent parts in the machines before the Court? It was the moveable set of arms sliding on the two square bars, passing through the hub of said moving set of arms, whereon this was made to traverse by means of a mechanical power applied. It was obvious to any mechanical mind, and so Col. Baldwin testified, that the screw, or the rack and pinion might be indifferently applied to the same structure. Indeed, the lever, the pulley and weight, and other powers, might be also applied to the same structure or constituent parts of the machinery. All these powers would subserve the same purpose, and by precisely the same means, that is, by augmenting the force in the inverse ratio of the velocity with which the force moved, and of course regulating the force by a gradual movement. Indeed, there can be no better test on earth of the identity of machines, than that their structure is such, that different \*powers \*462 may be indifferently applied to precisely the same constituent

parts, and the operations of those parts, and the effects produced by the application of one or the other power be the same. At all events, whether the substitution of one power, instead of another, do or not constitute a difference, must be a question for the Jury, which they are to determine upon the evidence of intelligent mechanics. To test this yet farther, let it be supposed, that the defendant had applied for and obtained a patent as for an improvement on the plaintiffs' machine, and had specified the substitution of the rack and pinion, it is clear, that in an action by the defendants against a party for an infringement, it would be competent for such party to raise the question, whether the application of the rack and pinion were any thing more than a simple change of form. From evidence disclosed in this case, it might be made to appear, that there was no difference in the effect, and no difference in the structure of the constituent essential parts of the machine, whereby the operation of stretching the silk is obtained. It would also appear that the force applied to give motion to the moving set of arms is augmented and graduated in the same ratio, and *quoad* these machines, if Col. Baldwin and others are believed, is the same. At all events, whether it were so or not, would be a question of fact to the Jury; and if they were of opinion, that the substitution of the rack and pinion was simply a change in form, the defendants in such case could not hold their patent, because the Statute says, simply changing the form shall not be deemed a discovery. Again, if on the contrary the application of a rack and pinion were not found to be simply a change in form, but an improvement, and this were the improvement specified, the defendants could not use the constituent parts of the machine, because the Statute, second section, expressly enacts, that the patentee of the improvement shall not be

\*463 at liberty to use the original \*discovery; and surely, if the defendants could not use the discovery of the plaintiffs, if the defendants were patentees of the application of the rack as an im-

provement, *à fortiori* they could not use the plaintiffs' discovery now, that they are not patentees of an improvement. Here the defendants may contend, that the plaintiffs have not specified their original discovery, so that the same may be distinguished from what was known before; and whether they have or not, is next to be considered. Now the plaintiffs, in their specification, first describe the whole reel as used by them, and a machine in magnitude was produced. No objection was taken at the trial, as to the sufficiency of this description. It was fully admitted, that the whole machine, such as it appeared, was clearly described. Then the plaintiffs describe another reel, consisting of four arms and a square axle, through which axle some holes being made at certain distances, the moving set of arms could be secured at the requisite distance, according to the width of the material wound upon the reel. This also was so clearly and distinctly described, that the defendants therefrom constructed in model a reel, conforming exactly to the description. Whereupon the plaintiffs, in their specifications say, that the new reel is, in all material respects, an improvement upon the old reel, and for these material improvements they claim their patent. Now, whether there are any such material improvements was matter of fact to the Jury, and what these improvements were, was also matter of fact. Nothing could be plainer, than that a material difference existed, both in the effect produced, and in the mode of operation to produce that effect. The Jury were satisfied, both as to the difference of the new from the old, and that this difference made the new better than the old; and what is improvement, but being different and better? But, said the defendants, the patentees ought to have designated, in precise terms, the particular parts which constituted the \*difference. The answer to this doctrine \*464 is found in the Statute. The inventor, says the third section, shall fully explain the principles and character by which the machine may be distinguished from other inventions. Now the

new machine was fully described, so that artists could make one from the specification. The old machine was described, so that artists could make one like that from the description; and it was manifest on inspection and from the evidence, that they were in character materially different. Certainty, to a common intent alone, is required. No precise or technical language is necessary. The public derive all the benefit, that the patent law contemplated securing to the public, and the patentee has secured to him no more than his invention. The Jury found it so; and surely the Court cannot otherwise decide, without assuming the determination of matters of fact. In the case of *Harmer v. Playne*,<sup>1</sup> it was held, that a description of the old and description of the new machine in the same patent, although the description of the old was merely by recital of the former patent, was description enough of the improvement for which the patent was obtained. In the case of *Watt and Boulton v. Bull*, it was held, that the description was sufficient, although no precise form or proportion of the condenser was described, nor its relative position to the cylinder named, nor the means of communication between the cylinder and condenser distinctly mentioned. It is enough, said the Court, if an artist can produce the designed effect from the description contained in the specification. It cannot be, that inventors are required to describe pin for pin, screw for screw, and all the numerous unpatentable differences, that must exist in every machine, however new, in common with other machines. There are shades of difference in machines, \*465 which result from their \*original character, and like the shades of difference in the social and professional habits of men, which depend on their predominant passions or qualities, are seen and understood, but yet are without a name, nor is it in the power of language to describe them.

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<sup>1</sup> 11 East R. 101.



It is enough for the public, if artists can see and understand these distinctive or essential qualities of the machine from the specification. It is enough for the parties at a trial, if the Jury perceive and comprehend them, and find them, in their opinion, sufficiently described in the patent or specification.

It comes next in course to consider the novel doctrine assumed by the defendants, that the plaintiffs must be considered as claiming a patent for the combination, such as it was exemplified in their machine, or else they must be considered as limited to special improvements, and these they must designate. Having already considered the latter alternative, I proceed to consider the former. In the first place, there is not a word of combination in the plaintiff's patent, nor would this be necessary to secure his invention, if this were in fact only a combination of such parts as, properly speaking, in relation to mechanics could be combined; for the inventor is entitled to his patent, if he fully explain his invention, and the principle and character thereof, so as to distinguish it from all others known or used before; and surely this might be done in *Evans's case* without using the word combination. But what is combination, and what parts may be combined? Is driving a nail, or turning a screw into a piece of wood a combination? Is putting arms or spokes to a hub — is putting two wheels to an axis, a combination? It is obvious enough, what combination is not. Nor is it less plain, what it is. The connexion of several distinct machines together, like *Evans's* mill, so as to be operated upon by one power, giving co-operative motion to all, is clearly a combination. \* There each machine \*466 has its characteristic, constituent parts — a being, a life of its own; but the connexion of a thousand dead parts in one machine, having but one single simple operation, can never be considered a combination. A watch is a combination; for the main-spring is one power, and puts the whole machine into operation, but the hair-spring is a power that regulates this motion. Here, then, are two

distinct operations. So in the card machine of Whittemore, there is a combination of parts, each performing a distinct operation, and the whole acted upon and regulated by numerous powers. But in the plaintiffs' reel there is but one power, and one single simple operation, that of moving the traversing set of arms; and it is said, "that some machines are so simple, that they cannot be considered as combinations." The reel, therefore, of the plaintiffs cannot be regarded as a combination. But if it were, and the only alleged difference were the use of the rack and pinion instead of the screw, the question of difference is for the Jury; and they are to decide, "whether, on the whole, there is any substantial difference between the machines, or whether they are substantially the same." Slight or colorable differences will not protect the defendants in their infringement, or defeat the right of the patentee; and this brings us back to the general question of identity, which lies exclusively within the province of the Jury; for infringement or not, of course identity or not, says Judge *Rooke*, is for the Jury to decide.

I have now considered the several questions made at the trial, and have shown, as it is believed, that the questions, whether the plaintiffs jointly invented the reel, whether the patent is broader than the invention, and whether the improvement, as such, is sufficiently described for all the purposes of the patent law, are all purely questions of fact. And I have also shown, as it is believed, and the doctrine of combination does not apply to the plaintiffs' reel; but \* whether it does or not, that the question of the identity of the defendants' and plaintiffs' machine is still the same, and is merely a question of fact.

In presenting this view of the subject, it will be perceived, that I have directly encountered all the objections taken in the defendants' motion, which are comprised in the first five causes assigned for a new trial. The first five causes are so involved with each other, that an attempt to give a special reply to each,

would have left the whole subject in confusion. They altogether amount to this merely, that the plaintiffs have invented nothing; that if they have, their invention is not sufficiently described and distinguished in the specification; but if it is sufficiently described, the defendants have not used the plaintiffs' invention. All this is matter of fact, and as such, was properly submitted to the Jury; and on all these points the evidence was either full for the plaintiffs, and uncontradicted, or else there was evidence on both sides; whence it follows, that the verdict for either of said five causes, or for the last, cannot be set aside as being against evidence.

As to the sixth cause, that the Judge misdirected the Jury touching the validity of the plaintiffs' joint patent, to wit, that it was valid, although patents for the same invention had been issued, in 1809, to each of the plaintiffs, as sole inventor of the same, and for aught that appeared, both the patents were in force when the action on the joint patent was commenced. The counsel for the plaintiffs is satisfied on authorities, that this direction was unexceptionable and correct. This is a new question in Court, although a practice in the patent office has doubtless given many occasions of its being raised. But as this is not a point mainly in controversy now, I shall content myself with stating a few points of law, and citing the authorities, that support them.

\* It is a natural right, which every patentee hath, to surrender \*468 his invention, if the acceptance of it imposed no condition, which remained unperformed. In England a patentee may surrender his patent into Chancery,<sup>1</sup> and when the surrender is enrolled a vacatur is entered of course. This is by order of Chancery according to ancient practice. But the Circuit Court of the United States has no cognizance in chancery of patents, nor has the law designated any mode, whereby a patentee may surrender

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<sup>1</sup> See *Dyer's case*, 1 Dyer, 179, and notes.

his patent. In favor, therefore, of common rights, a Court of Common Law will presume a surrender, wherever it is for the interest of a patentee, that he shall be considered as having surrendered. But the subsequent acceptance of a patent, which is incompatible with a former one, is in law an implied surrender of the former. The patents of 1809 are already inconsistent with the patent of 1818. Nay, the plaintiffs by their subsequent oath of joint invention, have utterly defeated all title under their precedent patents, independently of the surrender implied by the acceptance of the last patent.

Touching the plaintiffs' oaths as to their respective exclusive invention, it was regarded as clearly a matter of mistake, into which joint inventors might naturally fall when ignorant, as they each were, of the extent of the other's design and contrivance. In conclusion it is proper to observe, that this motion for a new trial is an application to the sound discretion of the Court for an equitable interposition of its powers. To what equitable consideration are these defendants entitled? Were they not the clerk and apprentice of the plaintiff, Barrett? Did they not learn of him the use of the machines in question? Did they not employ a workman of his to take the measurement of his machines, and \*469 then, from the very outset, engage him in a \*suite of contrivances, to approximate to the plaintiffs' machines, and yet to save the appearance of invasion of their rights, while in fact the original design of the defendants was unquestionably, by slight and colorable differences, to conceal the infringement they consciously intended? Surely it must be admitted on all hands, that the plaintiffs have invented a most valuable method of extending the silk for dying; and if a Jury of the country, selected from that public, for whose benefit the patent is granted, are in truth satisfied on all the material points, it cannot be justice to perplex and harass the plaintiffs with the necessity of further suit to obtain enjoyment of their just right and privilege. Besides, it must be

remembered, that patents in England receive a strict construction, because they are there considered as being in derogation of common right. Whereas, in the United States, they are more justly regarded as bounties upon the productions of genius, and as means of great and extensive benefit to the public. As such, they ought here to receive the most liberal construction; and no patent should be held void, if it in fact fulfil the ultimate design of the patent law; if it furnish in the specification a description essentially certain, to enable the public to avail itself of the invention after the patent term shall have expired. This is the object of the law; and to this, as the great end of all its provisions, ought the attention of the judiciary and juries to be directed.

STORY J. This case has been argued for the plaintiffs, as fully and as ingeniously as its merits will allow, upon the same principles and reasonings, which were pressed upon the Court at the trial. If they have failed to convince the understanding of the Court, it is because in some instances the premises, and in others, the conclusions are radically unsound and inadmissible. I pass over all the learned lecture, as to what constitutes matter of fact and \* what of law, and what are the relative rights of Courts \*470 and juries as to matters of fact, because no novelty and no instruction can attach themselves to the discussion. The whole doctrine lies in the elements of the Common Law, undisputed and indisputable. As little do I think it necessary to discuss the question, what constitutes the identity or diversity of machines in the abstract; or to philosophize respecting the different mechanical powers. My humble knowledge does not permit me to venture on such difficult topics, and fortunately my duties as a Judge do not require me to master them. I am content on these, as on other occasions, to learn from those, who can give the proper instruction, and then to apply it to the solution of such questions of law, as are fit to be entertained here. To be sure,

I must continue to believe, until better instructed, that the different mechanical powers are not one and the same power ; and that a motion, which is communicated by a screw is not communicated in the same way as that by a lever, a wheel, a wedge, or a pulley.

As to the opinion of skilful witnesses, whether the principles of two machines are the same, no person doubts, that it is competent evidence to be introduced into a patent cause. But care should be taken to distinguish, what is meant by a principle. In the minds of some men, a principle means an elementary truth, or power ; so that in the view of such men, all machines, which perform their appropriate functions by motion, in whatever way produced, are alike in principle, since motion is the element employed. No one, however, in the least acquainted with law, would for a moment contend, that a principle in this sense is the subject of a patent ; and if it were otherwise, it would put an end to all patents for all machines, which employed motion, for this has been known as a principle, or elementary power, from the beginning of time. The true legal meaning of the principle of a machine, with reference to the \*Patent Act, is the peculiar structure or constituent parts of such machine. And in this view the question may be very properly asked, in cases of doubt or complexity, of skilful persons, whether the principles of two machines be the same or different. Now, the principles of two machines may be the same, although the form or proportions may be different. They may substantially employ the same power in the same way, though the external mechanism be apparently different. On the other hand, the principles of two machines may be very different, although their external structure may have great similarity in many respects. It would be exceedingly difficult to contend, that a machine, which raised water by a lever, was the same in principle with a machine, which raised it by a screw, a pulley, or a wedge, whatever in other respects might be the similarity of the apparatus.

But, although the testimony of witnesses be admissible to prove the identity or diversity of machines in principle, yet, after all, it is but matter of opinion ; and its weight must be judged of by all the other circumstances of the case. It is infinitely more satisfactory to ascertain, if we can, the precise differences and agreements ; and when these can be subjected to the eyes, they almost supersede all the evidence of mere opinion. In all my experience I can scarcely recollect a single instance, in which the general question, whether the principles of two machines were the same or different, has not produced from different witnesses, equally credible and equally intelligent, opposite answers. This could result only from the different meanings attached to the word, and from confounding its various senses. And this has been completely shown, when the same witnesses came to explain the precise agreements and differences, in which they have almost uniformly agreed. The case now before the Court is a perfect proof in point. The witnesses differed as to the identity or diversity of the \* principles of the machines ; but they were \*472 all agreed as to what were the precise differences and agreements in fact. There seemed then nothing left for the jury to decide, but whether these differences were substantial or formal ; if substantial, then the machines were not alike ; if formal only, then they were alike. And the question, whether the principles were the same in both machines, was in reality, when all the facts were given, rather a matter of law, than of the opinion of mechanics ; at least matter of law was necessarily mixed up with it, which mechanics could not be presumed to be acquainted with.

The opinion, however, which I shall express, will not turn in any material respect upon any facts controverted at the trial. I shall discuss the motion for a new trial, so far as facts are concerned, upon the admissions and statements, which the plaintiffs did not and could not deny. The doctrine of patents may truly be said to constitute the metaphysics of the law. The difficulty

lies, not so much in the general principles, as in the minute and subtle distinctions, which occasionally arise in the application of those principles. I will endeavour, however, to lay down some general rules, which appear to me to embrace the whole merits of the present controversy, and then apply those rules more pointedly to the facts of this case.

In the first place, a joint patent may well be granted upon a joint invention. There is no difficulty in supposing in point of fact, that a complicated invention may be the gradual result of the combined mental operations of two persons acting together, *pari passu*, in the invention. And if this be true, then as neither of them could justly claim to be the sole inventor in such a case, it must follow, that the invention is joint, and that they are jointly entitled to a patent. And so are the express words of the Patent \*473 Act,<sup>1</sup> \* which declares, that if any person or persons shall allege, that he or they have invented, &c. a patent shall be granted to him or them for the invention.

In the next place, a joint patent cannot be sustained upon a sole invention of either of the patentees ; for the Patent Act gives no right to a patent, except to the inventor ; and requires an oath from the party, who claims a patent, that he is the true inventor.

In the next place, a joint patent for an invention is utterly inconsistent with several patents for the same invention by the same patentees. For it is impossible, that any person can be, at the same time, the joint and sole inventor of the same invention. If, therefore, each of the joint patentees obtains a several patent for the same invention, as his own exclusive invention ; and afterwards, without surrendering the first patent, they obtain a joint patent for the same as a joint invention, either the former sole patents are void, or the joint patent is void. For, besides the

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<sup>1</sup> Act of 21 February, 1793, ch. 11, § 1.



apparent inconsistency of the patents, if all could be sustained then a recovery upon the joint patent would be no bar to a suit upon the several patents; and the parties might obtain a double recompense for the same infringement. There is an additional reason, which deserves great consideration; and that is, that if several and joint patents could be sustained by the same parties for the same invention, they might be successively taken out, so that the term of the exclusive right might be prolonged for a great length of time, instead of being limited to fourteen years. I am therefore clearly of opinion, that a grant of a subsequent patent for an invention is an estoppel to the patentee to set up any prior grant for the same invention, which is inconsistent with the terms of the last grant. And I have very great doubts, whether, when a patent is once granted to any person for an invention, he can legally acquire any right under a subsequent patent for the same invention, unless his first patent be \*repealed \*474 for some original defect, so that it might truly be said to be a void patent.

In the next place if several patents are taken out by several patentees for a several invention, and the same patentees afterwards take out a joint patent for the same as a joint invention, the parties are not absolutely estopped by the former patents from asserting the invention to be joint; but the former patents are very strong evidence against the joint invention. The reason of this doctrine is, not that estoppels are odious in the law, but that a party may innocently mistake, as to the extent of his own claims. And though a several and joint invention, by the same persons of the same thing, cannot exist in fact; yet a party may suppose, that he has invented, what in truth has been partly suggested by another mind.

In the present case, each of the plaintiffs (Barrett and Stearns) obtained, in the year 1809, a several patent for the present invention, as his sole invention; and the patent, on which this action

is brought, is a joint patent granted in 1818. In this view, the doctrine already stated directly applies in the case. It is the same, as was stated to the jury at the trial, and on the most mature reflection, I adhere to it.

In the next place, a patent may be for a new combination of machines to produce certain effects; and this, whether the machines, constituting the combination, be new or old. But in such case, the patent being for the combination only, it is no infringement of the patent to use any of the machines separately, if the whole combination be not used; for in such a case the thing patented is not the separate machines, but the combination; and the Statute gives no remedy, except for a violation of the thing patented. This was the doctrine of Mr. Justice *Washington* in his most able opinion in *Evans v. Eaton*; and it has not \*475 \*been in the slightest degree shaken in the Supreme Court.<sup>1</sup> I hesitate not one moment in adopting it, as established on solid foundations. It has indeed been said, that where there is a patent for the whole of a machine, whoever imitates it, either in whole or in part, is subject to an action at the suit of the patentee.<sup>2</sup> But supposing this doctrine to be true in any case and under any qualifications, (which may well be doubted,) it can apply, where the whole machine is entirely new, and cannot apply, where the patent is limited, by its very terms, to the combination of several machines.

Further. A patent under the general Patent Act, cannot embrace various distinct improvements or inventions; but in such case the party must take out separate patents. If the patentee has invented certain improved machines, which are capable of a distinct operation; and also has invented a combination of those machines to produce a connected result, the same patent cannot

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<sup>1</sup> *Evans v. Eaton*, 3 Wheat. R. 454, 476, 506.

<sup>2</sup> *Boyll v. Moore*, 2 Marsh. R. 211.

at once be for the combination and for each of the improved machines; for the inventions are as distinct, as if the subjects were entirely different. A very significant doubt has been expressed on this subject by the Supreme Court; and I am persuaded, that the doubt can never be successfully removed.<sup>1</sup>

Further. If a patent be for an improved machine, or for an improvement of a machine, (for I follow Mr. Justice *Heath*<sup>2</sup> and the Supreme Court<sup>3</sup> in thinking, that the meaning of the terms is substantially the same,) then the patent must state in what the improvement specifically consists; \* and it must be limited to \*476 such improvement. If, therefore, the terms be so obscure or doubtful, that the Court cannot say, what is the particular improvement, which the patentee claims, and to what it is limited, the patent is void for ambiguity.<sup>4</sup> And if it covers more than the improvement, it is void for another reason, that it is broader than the invention.

Further. Where a combination of machinery already exists up to a certain point; and the patentee makes an addition or improvement to the machinery; he must confine his patent to the improvement; for if he takes a patent for the whole machine as improved, not distinguishing between the new and old, nor limiting his patent to the improvement, it is void, because, as so claimed, it is not his invention.<sup>5</sup>

Further. If an invention consist in a new combination of machinery, or in improvements upon an old machine to produce an old effect; the patent should be for the combined machinery, or improvements on the old machine, and not for a mere mode or device for producing such effects, detached from the ma-

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<sup>1</sup> *Evans v. Eaton*, 3 Wheat. R. 454, 506.

<sup>2</sup> *Boulton v. Bull*, 2 H. Bl. 463, 482.

<sup>3</sup> *Evans v. Eaton*, 3 Wheat. R. 454.

<sup>4</sup> *M<sup>r</sup> Furlane v. Price*, 1 Starkie R. 199.

<sup>5</sup> *Bovill v. Moore*, 2 Marsh. R. 211.

chinery. This appears to have been the doctrine of all the Judges in *Boulton v. Bull*,<sup>1</sup> and was illustrated by several of the cases there put. And in a recent case, where a patent was obtained for "an improved mode of lighting cities," it was held, that it was not supported by a specification describing an improved street lamp; and that the patent ought to have been for an improved street lamp.<sup>2</sup> So, where the patent was for "a new invented manufacture of lace, called French, otherwise ground lace," and the specification went generally to the invention of mixing silk and cotton thread upon the frame; it being \*477 proved, that, prior to the patent, silk and cotton \*thread had been used together and intermixed upon the same frame, the Court held the patent bad, since the plaintiff claimed the exclusive liberty of making lace, composed of silk and cotton thread mixed, and not of any particular mode of mixing it; and the evidence proved it had been mixed before.<sup>3</sup> This doctrine may not be of as extensive consequence under our Patent Act, where the specification forms a part of the patent, and may control its generality, as it is in England, where the specification is separated from it. But it distinctly shows the necessity of an exact description, so that the patent may conform to the invention.

Let us now apply these principles to the case at bar. The patent is "for a new and useful improvement, being a mode of dying and finishing all kinds of silk woven goods." If these terms alone were to be considered as descriptive of the subject matter of the patent, it would be open to the objection in *Cochrane v. Smethurst*,<sup>4</sup> for the specification shows no other mode of dying and finishing silks, than by the use of an improved reel and an improved silk frame; and the patent ought to be for these

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<sup>1</sup> 2 H. Bl. R. 463.

<sup>2</sup> *Cochrane v. Smethurst*, 1 Starkie R. 205.

<sup>3</sup> *The King v. Elze*, 11 East R. 109, note.

<sup>4</sup> 1 Starkie R. 205.

improvements. But as the specification forms a part of the patent, and controls the generality of the preceding terms, it is to be construed a patent for a mode of dying and finishing silk woven goods, by means of an improved reel and an improved silk frame. The patent then is, not for a mode of dying alone, but of dying and finishing silks; and this, by means of the use of both machines, so that it is a patent for the machines in combination, and not separately. If so, then the defendants may use either of the machines separately, without infringing the patent right; for the exclusive right of the combination only is secured to the plaintiffs. In this view, there is an end of the present suit; for it is admitted by the plaintiffs, \* that the defendants did not \*478 use the silk frame, and that the only infringement, for which they seek a recompense, is the use of the reel. But if the patent could be construed, as a patent for each of the machines severally, as well as in the combination, then it would be void; because two separate inventions cannot be patented in one patent. And the same objection would lie against it, if it were to be construed as a patent for each of the machines severally, and not in combination.

If, however, all these difficulties could be surmounted, and the patent were to be construed as a patent for an improved reel and an improved frame separately, there remain other insuperable objections. There is no pretence, that the patent can be sustained for the whole reel, as a new invention, although some part of the language of the specification might lead to the conclusion, that the plaintiffs so intended to claim; for reels were in use before for the same purpose. And if it were otherwise, the plaintiffs could not recover; for the defendant does not use precisely the same machine; and if he did, the patent would be broader than the invention, and so void. The patent therefore must stand, if at all, as a patent for the improvements only upon the old reel. And what the improvements claimed by the plaintiffs are, must

be decided exclusively by the terms of their specification. The words of the specification, after describing the improved reel, are : — “ There has been, it is said, a reel heretofore in use for the like purposes ; but this, if it ever were so used, consisted of four arms, or two cross pieces, adjusted to a square axle ; and the set of arms were kept separate or fixed upon the axle, not by a screw, but by pins passing through holes in said axle. Instead of pins affixed to the arms, there were common tenter hooks driven into the inner side of the arms, and the whole so constructed, as to be utterly inapplicable to the purposes of dying silk or other goods  
\*479 without great injury. The machine, \* for which the applicants claim a patent, is, in all material respects, an improvement upon this.” This is the whole statement of the improvements in the reel, in the plaintiffs’ specification. And assuming, that it is not utterly defective, from omitting to specify the particular improvements, for which the patent is claimed, (for a general statement, that the patented reel is in all material respects (without stating what these are) an improvement on the old reel, is no specification at all,) the plaintiffs have bound themselves to the improvements so specified, and cannot now claim beyond them.<sup>1</sup> Now, the plaintiffs have specified no particular number of arms to be used in their machine, as among their improvements, and therefore no particular number of arms is patented. The machine is stated by themselves to consist “ of two sets of arms, each resembling in form the hub and spokes of a wheel, without the rim or fellies.” There is, therefore, nothing new in this particular ; and, in point of fact, the plaintiffs use eight arms and the defendants ten arms in their respective reels. The two principal improvements, actually specified, are the use of a screw, to separate gradually and keep apart the opposite arms of the reel, instead of a pin passing through a hole in the axle ; and the use of oblique trans-

<sup>1</sup> *Rex v. Culler*, 1 Starkie R. 354.

verse pins to hold the selvages of the silk, instead of tenter hooks. Now, in point of fact, the defendant does not in his reel use the pins described in the specification, but staples with a small barb, which are at least as different in form and effect from the pins, as the pins are different from tenter hooks. And pins or hooks of all sizes and finish were proved at the trial to have been used for at least thirty years last past, for the same purpose. There is no pretence, that the staples and barbs used by the defendants are exactly in size, shape, and direction like the plaintiffs'. Then, as to the screw ; it is a sufficient \*answer to the plaintiffs, that by \*480 their own showing the defendant never used the screw in his reels ; but used a rack and pinion, which, it is agreed, is a different mechanical power. The only two improvements, therefore, which are specified, are not used by the defendant, either separately or in combination. How then is it possible to contend, that he has violated the plaintiffs' patent.

This it not all. The pin or hook used for this purpose is not a new invention. It has been long in use, and, as was proved at the trial, at least for thirty years. I do not say, that a pin or hook was used exactly of the same shape, dimensions, and oblique position, as that used by the plaintiffs. But it is to be considered, that the mere change of the form or proportions of any mechanical apparatus is not, by the express terms of the Patent Act, to be deemed a patentable invention. And as to the screw, its use for the very purpose proposed by the plaintiffs, is completely described in the work cited at the bar, printed in 1789. The words are, "these frames are held together by means of a screw, so as to be easily let out, or taken in, according to the breadth of the cloth."

If, therefore, the patent could be considered as a patent for each of those improvements separately, it could not be sustained ; for neither of them is new in substance. If, for the combined improvements, then, in the first place, the defendant has not used

them ; and, in the next place, the patent is broader than the invention ; for, up to a certain point, the improvements existed before. The screw was in use for the same purpose, as early as 1789.

But, if we could go beyond the patent and specification, and consider the patented improvements to be such improvements, as the plaintiffs now claim, it would not relieve the case from a single difficulty. The plaintiffs now claim in addition to the improvements already specified, 1st. The use of more arms than four to wind the  
\*481 silk in a spiral form. \* The silk was wound in a spiral form before ; and surely it cannot be pretended, that the use of more than four arms on a reel or wheel was not known as well before as since the plaintiffs' invention. Besides ; the plaintiffs have not specified any particular number of arms as their invention, and they never used but eight ; and if such use constitute a separate invention, the defendant is at least as well entitled to claim the use of his ten as his own invention. If adding a given number of arms be an invention, adding a different number is not less an invention. 2dly. The plaintiffs claim the use of the side pieces to support and steady the screw during the operation. This is not, as I recollect, used by the defendants for the same purpose ; nor, if used separately with the screw, is it any thing new. If, therefore, the whole improvements, as now claimed, were specified in the schedule, the plaintiffs could not legally support a patent for them separately ; and if they are claimed in combination, then the defendants have not infringed upon that combination ; and if they had, the plaintiffs could not recover, because the combination up to a certain point existed (as they have shown) before. So that to sustain their patent in point of law, the plaintiffs are driven to construe it to be for the combination, and then the evidence of infringement fails them ; and to sustain their suit in point of fact, they are obliged to construe their patent to be for the improvements severally, and then they fail upon the clearest principles of law applied to the facts.



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I have thus gone over the whole grounds of this cause, and in every possible view, in which I can contemplate the law or the facts of the case, the verdict is wrong. Under such circumstances, to suffer it to stand, would be a mockery of justice. It would be surrendering the whole rights of the community to the mistakes or prejudices of juries. The public ought to know, that if a jury should be misled by the ingenuity or zeal of counsel, there is a redeeming \*spirit in the law itself; and that no judge in these \*482 times can be weak or wicked enough to abandon, what his duty plainly and peremptorily enjoins upon him.

Let the verdict be set aside, and a new trial granted. .

*New trial granted.*

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 UNITED STATES v. THEODORE LYMAN.

Debt lies in favor of the United States against the importer for the duties due on goods imported. The right to duties accrues by the importation with an intent to unlade; and immediately upon the importation the duties become a personal charge and debt on the importer. A bond taken at the Custom House to secure the duties due by the importer is not an extinguishment of the debt so accruing, but merely collateral security for its payment.

No person but the owner or consignee, or, in case of his sickness or absence, his agent or factor, is by the revenue laws entitled to enter and bond goods at the Custom House. A sub-purchaser after importation has no such right. The Collector has no authority to receive the bond of any person as security for the payment of duties, except such person be legally entitled to enter them.

Debt lies against the importer for the duties on smuggled goods. So, where by mistake or accident, or fraud, no bond is given to secure them. So, where short duties only have been paid.

An information of debt, or an information in the nature of a bill of discovery and account, is a proper remedy for the United States in such cases.

In what cases the taking of a higher security operates as an extinguishment of a debt, and in what cases not. Where such security is given by the debtor, *prima facie* the law presumes it intended as an extinguishment of the debt. *Aliter*, where it is the bond of a third person.

It seems, that a debt accruing by a Statute, though a specialty, is not of so high a dignity as a bond.

**T**HIS was an action of debt, brought by the United States against the defendant for \$17,242.40, being the amount of duties due on 500 chests of tea, imported into the port of Boston in the ship *Alert*, in July 1816. Plea, *nil debet*.

\*483 At the trial it appeared, that the defendant was the owner of the ship *Alert*, and of the 500 chests of tea in question ; and that the same were imported by him into \* Boston, on the 2d day of July, 1816. After the arrival and entry of the ship at the Custom House, the 500 chests of tea were, on the 8th day of July, purchased (whether really or nominally was a great question at the trial) by one Warren Lovejoy, who gave bonds at the Custom House, in the usual form, upon a deposit of the teas ; and afterwards, upon giving other bonds as usual, was permitted to receive the teas again, and they were re-delivered to and sold by the defendant. Soon after these transactions Lovejoy failed in business, and has ever since remained insolvent, and the bonds have never been paid.

*Prescott* and *Thacher* for the defendant contended, in the first place, that the action of debt at common law would not lie in this case ; that there was a specific remedy for the government provided by Statute, and that such remedy, therefore, must be pursued. Wherever a right is given by Statute, and no remedy pointed out by which to enforce it, an action of debt at common law will lie ; but wherever any remedy is provided by Statute, such remedy is in exclusion of all others, and must be adopted.<sup>1</sup> It is contended with great confidence, that the legislature have expressly prescribed in the 62d section of the Collection Act of the 2d of March, 1799, what security shall be taken by the govern-

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<sup>1</sup> *Stevens v. Evans et al.* 2 Burr R. 1152. *Smith v. Drew*, 5 Mass. R. 514. *Gedney v. Tewksbury*, 3 Mass. R. 307. *Bigelow v. Turnpike Corporation*, 7 Mass. R. 202. *Respublica v. Lacaze*, 2 Dallas R. 118.

ment for the duties on the article of tea ; and that it is upon this security only, that they can have their remedy for the non-payment of such duties.

In putting a construction on the different acts in relation to this subject, we should always bear it in mind, that it is not the object of the government to lay any unnecessary impositions upon the commercial part of the community, or \*uselessly to interrupt the \*484 facilities of foreign traffic. That, on the contrary, the essential interests of the country require, that commercial enterprise should receive every encouragement, for this is one of the principal sources of public revenue, and one of the most fruitful inlets to the national wealth ; and to burden the merchant with excessive duties, or lay him under unreasonable obligations for their payment, would be striking at the foundation of the general welfare, no less than of individual prosperity. In conformity with such views, we shall find, that every act passed upon the subject of duties since their first establishment, has had it for a principal object to render the payment of them as light and convenient as possible.

The first Statute laying a duty on goods, &c. imported into the United States, was passed on the 4th day of July, 1789, and by this the importer became indebted to the government immediately upon the importation, and his acceptance of the goods ; but as no provision was then made for the collection of the debts, the only remedy for the non-payment of the duties was an action of debt at common law against the delinquent importer. On the 31st of the same month another act was passed, regulating the collection of the duties before established ; in the 15th section of which it is enacted, that an inspector shall be put on board every vessel, that arrives at any port of entry or delivery, who shall take charge of the goods, &c. in said ship, and not suffer any of them to be delivered without a permit from the proper officer. By this act, then, the government are put in possession of two distinct

securities for their duties ; one, the personal responsibility of the importer, the other, the actual possession of the goods themselves, on which the duties accrue. Neither of these securities, perhaps, taken by itself, would be sufficient, but when connected, they most perfectly protect the government from any loss, excepting \*485 such only as may arise from the indiscretion \* of their own officers. And we think it will be apparent, that as no better security than this was necessary, so it never has been the intention of the legislature, in their subsequent acts, to provide any in addition to it, but only to specify, what should be received in lieu thereof, when the interest of trade and the convenience of the merchant made it necessary, that this should be given up. We find, accordingly, that in the 19th section of the Act last referred to, the importer is permitted to take his goods from the vessel, and from the possession of the collector upon complying with one of two conditions — either depositing with the collector so much of the merchandise as will be equal to twice the amount of duties, or else giving his bond with sureties to the satisfaction of the collector. It is very clear, that whichever of these alternatives the owner of the merchandise may think best to elect, the duties will be amply secured. If the former is made choice of, the government have very much the same security as before ; a sufficient quantity of the merchandise, and the personal responsibility of the owner. If the latter, they have his bond with any names thereon the collector may demand.

The next Act, of the 4th of August, 1790, makes express provision for the article of tea imported from China, allowing a credit of twelve months, instead of six, as in the case of other merchandise ; provided the whole quantity of teas should be deposited, or bond given as before. It is observable, that no bond is here required of the person making entry of the teas, if the same are deposited ; but by the Statute of the 2d of March, 1799, which repeals the former one, and extends the credit given

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to the term of two years, the single bond of the owner is required, together with the deposit of the teas, and, as we contend, in lieu of the simple responsibility he was before under to pay the duties, and not in addition to the same. In the 62d section of that Statute it is enacted that, "on teas imported from China, it \*shall be at the option of the importer or importers (to be deter- \*486 mined at the time of making entry hereof) either to secure the duties thereon, on the same terms and stipulations as on other goods, wares, and merchandise imported," (and these terms and stipulations were by depositing the goods, as before stated, and continuing the personal liability of the importer during their deposit, or by giving a bond with sureties to pay the duties in six months) "or to give his, her, or their bond to the collector of the district, where any such teas shall be landed, in double the amount of the duties thereupon, with condition for the payment of the said duties in two years from the date of such bond."

This, then, is the security to be taken by the government in lieu of the personal liability of the importer, and the deposit of the goods, as in the case of other merchandise. The Statute then goes on to say, "which bond shall be accepted by such collector without surety, upon the terms following; that is to say, the teas, for the duties whereof such bond shall be accepted, shall be deposited at the expense and risk of the said importer or importers, in one or more storehouses," &c. We contend then, that by the acceptance of the bond as described in this Statute, the government released their common law remedy against the importer, and relied altogether upon this higher security, and their possession of the goods. The purpose of the Statute was evidently to favor the merchant, and not to demand additional obligations of him. The duties upon tea, in the case of a considerable importation, amount to a large sum of money. It was the intention of the legislature to make the payment of them as convenient as possible. They, therefore, extend the credit to

two years ; and for this they only require, that, besides the possession of the goods, the owner or importer should come forward and acknowledge in a bond, that he is the person who is indebted to the government, and that he will pay the debt within the  
\*487 \* time limited. This they demand, instead of his simple liability, because it does not lay any additional obligation on him, and at the same time affords to them a more safe and expeditious remedy than the action of debt at common law, by rendering certain the amount due, and the person indebted.

If the Court does not agree with us, that the simple liability of the person making the entry is merged in the bond given by him, but continues until the duties are paid ; we then contend that the purchaser of goods, while on ship board may lawfully enter and secure the duties, and thereby discharge the importer ; and that, if the jury shall find, that Lovejoy was such a purchaser in this case, then this action lies against him only. The words *importer*, *owner*, and *consignee* are used promiscuously in the Acts passed on this subject. The Act of 1789 says, that all duties, &c. shall be paid by the importer before a permit be granted for landing the goods, unless the amount of such duties shall exceed fifty dollars, "in which case it shall be at the option of *the party making entry*, to secure the same by bond."

The Act of 1790 provides, "That all teas imported from China, may, at the option of the *proprietor* or *consignee* thereof, be deposited," &c.

The 49th section of the last Collection Act, of 1799, speaks of the *owner* or *consignee*, and provides that the *owner's* name shall be inserted in the permit. The same Act requires, that one appraiser shall be appointed by the *owner*, *importer*, or *consignee*.

Besides the evidence to be drawn from the use of these different terms in the Statutes, it seems but reasonable to suppose, that it was not the intention of the legislature to confine the making

entry to the importer alone. Their only object was to provide the government with sufficient security ; this was done by requiring a deposit of the teas \*in the first instance, and upon the re-<sup>\*488</sup>linquishment of them, a bond with as many sureties as the collector thought best to require. Under these circumstances, it would be of very little importance, who was the principal in the bonds. In addition to this, we find that such has been the construction put upon these Statutes by the collectors ever since their passage ; and that it has been the universal practice, up to this very moment, at the Custom House, to take the bond of purchasers, and permit them to make entry.

Upon the same grounds we contend, that Lovejoy might, if necessary, be considered as the *consignee* of these teas ; they were consigned to order, and by purchasing before the entry, he made himself the consignee.

But if the Court should be against us on all these points, we then contend that the bonds given by Lovejoy extinguished the defendant's liability ; they would in that case be the bonds of a stranger.

The duty upon the goods accrues immediately upon their importation ; but the personal liability of the importer does not commence until he comes forward and accepts them. Before that time, the government have only a lien upon the goods for the duties ; and if the duties are not paid within a certain time, the government are authorized by Statute to dispose of the goods. In *Hooper's case*<sup>1</sup> it was held, that a specialty of itself extinguished a simple contract, when given upon the contract, and at the time it was made. This doctrine has been frequently recognised, and never questioned. The defendant in this case never accepted these goods, never took any steps towards making entry of them before the bond was given by Lovejoy. If therefore

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<sup>1</sup> 2 Leon. R. 110.

Lovejoy should be considered as his agent in this business, then Lovejoy's bond was given upon the defendant's debt and at the time it accrued, and of consequence extinguished the same.

- \*489 \* It has been thrown out by the counsel for the government, that the debt due in this case for the duties is a debt by specialty, and therefore not extinguished by a bond. We answer, that it has never been determined, that debts arising on Statutes were specialties, excepting to avoid the Statute of limitations; they never have been considered so in classing debts.

In actions on Statutes, the Statute itself is not sufficient to maintain the action; the transgression or compliance with it must be proved by evidence *dehors* the Statute. The debt for duties in this case, cannot properly be said to arise from Statute; it arises from the importation and acceptance of the goods, and the plea of *nil debet* is a good plea.

But, if the bond of a stranger could not of itself extinguish the debt, yet the acceptance of it in satisfaction would discharge the defendant.<sup>1</sup> The acceptance of a bond, or even a note, or bill of exchange in satisfaction of a bond, discharges the debt.

The Collector represents the United States in every thing relating to collecting the duties. He had taken the single bond of Lovejoy, and still retained the teas in his custody. He then accepts, instead of the teas and the single bond of Lovejoy, his bond with sureties. The law makes the Collector the judge of the security: the words are, "to give sureties to the satisfaction of the Collector"; and it would be very hard upon the importer, if the government, after receiving through their officer as ample

<sup>1</sup> *Tom v. Goodrich*, 2 Johns. R. 213. *Sluby v. Champlin*, 4 Johns. R. 465. *Geyer v. Smith*, 1 Dallas R. 347. *Schack v. Anthony*, 1 Maul. & Sel. 573. *Drake v. Mitchell*, 3 East R. 251. *Hooper's case*, 2 Leon. R. 110. *Banorjee v. Hovey*, 5 Mass. R. 11. *Atty v. Parish*, 4 Bos. & Pull. R. 104. 3 Bac. Abr. *Extinguishment*, (D.)



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security as they saw fit to demand, should, in the event of its proving insufficient, lay the loss upon the importer. It \*is to be \*490 observed, that it is not required by the law, that the last bond with sureties should be the bond of the importer or person making the entry ; it only requires, that he should give a bond with sureties, to the satisfaction of the Collector. In this case, the bond of Lovejoy was given, with such sureties as the Collector thought sufficient ; and the debt of the defendant, if there was any then subsisting against him, was thereby discharged.

*Blake*, District Attorney, and *Webster*, contended, on behalf of the United States, that by the importation, the importer incurred a personal debt, which the government could recover, either by action against the importer personally, or by proceeding against the goods. The Statute enacts, that upon all goods imported, duties, at the established rates, shall be levied, collected, and paid. This enactment creates a direct debt. The English Statutes are not more positive. In England, also, there is a right to proceed against the goods themselves ; yet it is holden, and was never doubted, that "debt lies for customs due for merchandise, though the goods are forfeited for non-payment."<sup>1</sup> The King, says Lord *Hale*, may originally sue for the duty itself, as well as for the forfeiture for landing the goods, the duties not paid.<sup>2</sup> Ordinarily there is little motive to sue for the duties, so long as the goods themselves are retained, inasmuch as a more effectual and speedy remedy may be had by a direct proceeding against the goods. But where possession of the goods has been relinquished, through mistake, or otherwise ; or where they have never been in the hands of the Custom-House, and other such cases, duties charged on them are recovered in the Ex-

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<sup>1</sup> Com. Dig. *Debt* (A, 9.) 1 Roll. R. 383.

<sup>2</sup> Harg. Law Tr. 216, 222.

chequer, either by English information, which is the \*King's bill in equity, or by information of debt, which is his action of debt. Instances of the former mode of proceeding are, among others, the *Attorney-General v. Chitty*, Parker's R. 37. *The same v. Cresmer*, Ibid. 279. *The same v. Stranyforth*, Bunbury R. 97. *The same v. Senior*, Doug. R. 411, *in notis*. *The same v. Mico*, Hard. R. 137. *The same v. —*, Ibid. 201. *Walter v. Travers*, Ibid. 301. *Attorney-General v. Horsham*, Ibid. 477. Of the latter mode, the following are instances:—*The Attorney-General v. Jewers*, Bunb. R. 225. *The same v. Hatten*, Ibid. 262. *The same v. —*, Anstruther's R. 558. *The same v. Tooke*, Hard. R. 334. *The same v. Weeks*, Bunb. R. 223. If goods be smuggled, an action will still lie for duties; and after the expiration of the time for bringing a penal suit, and the right of proceeding for a forfeiture being waived, the importer may be called on, by information in equity, to disclose the amount and value of the goods thus smuggled.<sup>1</sup> So if goods upon which duties are charged perish, the owner is still liable for duties,<sup>2</sup> because a charge of duties on the goods is a charge on the owner. It means, that he shall be debited with the amount. Some of the Acts of Congress say expressly, that the duties shall be paid by the importer.<sup>3</sup> The action for duties is properly to be brought against the importer, and will not lie against his mere agent or servant; but a factor for a person abroad is treated as owner, and is liable for duties. He is considered as the importer.<sup>4</sup>

It has been argued for the defendant, that wherever a Statute gives a right, and prescribes the remedy, such prescribed remedy only can be pursued; and that the law having provided for bonds to be given for the duties, the government has no remedy \*492 but on the bonds. Various \* answers might be given to this

<sup>1</sup> Parker's R. 279.

<sup>2</sup> U. S. Laws, new edit. vol. 2, p. 23.

<sup>3</sup> Anstruther R. 558.

<sup>4</sup> Bunb. 223.

argument. It would be sufficient to say, that the Act laying the duties does not prescribe any mode of proceeding to collect them. The rule, therefore, does not apply to the case ; for it is limited to cases, where the right and remedy are given and prescribed in the same Statute. If a Statute gives a right without prescribing a remedy, all proper legal remedies immediately attach to the right. And if afterwards another Statute gives a particular remedy, but without words necessarily importing an exclusion of other remedies, the remedy thus given will be accumulative, and the former remedies will still remain. But another answer is, that no law of the United States prescribes a bond as a remedy, in the sense of the term as used in the cases cited. The United States cannot compel the importer to give bond. It is, therefore, not a remedy to enforce the collection of the duties, but a mere indulgence or option to the importer. A remedy, in the sense of the rule relied upon, means some course of legal proceeding by which the party may enforce his rights. It cannot, therefore, be any thing dependent on the will and pleasure of the party.

It is, in the next place, contended, that the importation is complete, and the obligation to pay the duties incurred, by bringing the goods into port, with intent to unload, and before entry. This point is very clearly settled by the cases.<sup>1</sup> The legal meaning of importation and exportation is almost the exact, literal, and etymological signification of these terms. As importation is not the making entry of goods at the Custom House, but merely the bringing them into port, and so is complete before entry ; so exportation is not the clearance outward, but the actually going out of port. For if a vessel be cleared outwards, and has paid \* the \*493 export duties, and before she actually leaves the port, new export duties are laid, such duties attach on the cargo.<sup>2</sup> The vessel in

<sup>1</sup> Harg. Law Tr. 213, 216. Bunb. 97. 1 Gallis. R. 206, 239, 348, 355. 5 Cranch R. 368.

<sup>2</sup> Price, Exch. Rep. 382.

this case entered the port, with intent to unload her cargo, on the second day of July. On that day, therefore, the duties became due. The defendant then became liable to pay them; and he must show, that this liability has in some way become extinguished. The duties not having been paid, nor released, has his original liability been extinguished? The duties having become a debt due to the United States immediately upon the importation of the goods, there were two modes, in either of which the United States might proceed to collect this debt. One was, a personal action against the importer. The other, a seizure of the goods themselves, if the duties were not paid or secured. These remedies were concurrent. Either might be pursued, or both. There being then two remedies, what is the object and effect of taking the bonds, supposing them to be given fairly and by the proper parties. The bond of the party, given for his own simple contract debt will, no doubt, extinguish such debt, because it is a higher security. But one bond will not extinguish another; nor are any causes shown, in which a bond will extinguish any debt created by specialty. Duties accruing on the importation of merchandise, are not simple contract debts; they arise *ex vigore statuti*, and therefore partake of the nature of specialties. But if this were otherwise, generally, by the rules of law, yet, by the Act of Congress the bonds are but security, and are collateral to the original debt. The giving of long credits for duties, and the delivery of the merchandise in the mean time to the importer, were adopted originally for the benefit and promotion of trade, and to aid the capital of the country. Before the delivery of the

\*494 goods, the government had two securities \* for the duties — the possession of the goods, and the personal ability of the importer. These were co-existing and concurrent. Then the Act provides, that by giving bond, with approved sureties, to secure the payment of the duties, the importer may receive his goods. The bond, then, was intended as security, and to stand in the place of

that security, which the government parted with. The bond with sureties is but a substitute for the possession of the goods; and as the two original remedies are concurrent, so the bond and the original remaining remedy are concurrent. The bond is taken, not as payment, but to secure the payment of the duties. The words of the Act are, that the duties "shall be paid, or secured to be paid by bond";<sup>1</sup> and in the case of teas, it is at the option of the importer, either "to secure" the "duties" in the same manner as on other goods, or to give his own bond, accompanied with a deposit of the teas. The bond being thus considered and treated by law as security for the debt, it is not payment of the debt, but collateral to it, and does not extinguish the original personal liability.

If a mortgage be given to secure the payment of a promissory note, and the deed contain a covenant to pay it, this, although a covenant by deed, does not extinguish the note, because intended to be collateral. It may be observed further, that the bond is always given, not to pay a sum then ascertained, but to pay the duties when afterwards ascertained, which is another proof, that it was intended to be collateral to the original debt. It would be inconvenient, and often unjust, to restrain the United States to their remedy on the security. The bonds might be for too small a sum, either by fraud or mistake. They might be lost, or stolen, or given up to the obligors collusively, without actual payment. There may be remedies, both in law \* and equity, by \*495 which the government is entitled to discover the value of goods imported, and to ascertain and recover the amount of duties, which would be wholly inapplicable to proceedings on the bond merely. For these reasons it is contended, that although the bond be given fairly, and by the proper parties, it does not extinguish the original debt; but that the United States have

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<sup>1</sup> Collection Act, 1799, § 62.

their election to proceed on the bond, or to call on the importer, upon the ground of the original debt. This point, however, does not necessarily arise in this case, because these bonds were not given by the proper parties. The original debt, in this case, was the debt of the defendant, as importer. The bond was given by Lovejoy and others. By the Common Law, the simple contract debt of one is not extinguished by the bond of another. It may be proved as matter of fact, that the bond of one man was received and accepted by the creditor in payment and satisfaction of the simple contract debt of another. And so may the promissory note of one be accepted in payment and satisfaction of the bond of another. But such cases are founded on the special agreement to accept, and not on the idea of an extinguishment by operation of law. If the collector in this case had voluntarily and without fraud or imposition, accepted Lovejoy's bond for the defendant's debt, (which we shall contend he clearly did not, when we come to the facts in proof,) it would be a good defence for the defendant, provided the collector had any authority by law to accept such bond. But we deny, that he has any such authority. The defendant is acknowledged to have been the importer of the goods, and the law requires his bond to be taken. The collector is a ministerial officer, and the Statute gives him in this particular no discretion. He is an agent, with a public power or authority, as well known to those, who deal with him, as to himself; and therefore they are bound to see, that they deal with

\*496 him only within the limit of his \* authority. The sections of the Statute immediately applicable to this point, are the 36th and 62d. By the first it is provided, that the owner or owners, consignee or consignees, shall make entry of the goods. It is clear, that the owners here intended, are the owners at the time of importation, because the form of entry prescribed by the same section is, "entry of merchandise imported by (insert the name of the importer or consignee.)" The entry, therefore, is to be

made by the importer or consignee. It is further said, that the entry or sureties to be made by any importer, consignee, or agent, &c. shall be verified by the oath of the person making it. The form of the oath is there given; and the words and clauses of it are absurd in the mouth of anybody, but the importer or consignee. He is to swear among other things, that the original cost is correctly stated in the entry. How is this to be done by a purchaser after importation, who knows nothing, and can know nothing himself, of the original cost? He is to swear, that the invoices produced by him are true; whereas, not being the purchaser at the place of exportation, and the goods not having been sent to him, he cannot know, whether the invoices given to him are true or false. This is a matter of the utmost importance. The invoices, until the Act of the last session, have been the basis, upon which all *ad valorem* duties were calculated. They are to be verified by the oath of the importer, who knows whether they be true or false. But if other persons may enter goods and produce to the Custom House such invoices merely as are produced to them, there is not even the security of a custom oath for the revenue.

By the 62d section, the duties are either to be paid immediately, or at the option of the importer to be secured to be paid by bond, with one or more sureties. Who is to be principal in the bond? Obviously, we should think, the importer. And in prescribing the form of the bond, in the \* blank left for the name \*497 of the obligors, the direction of the Act is, "(here insert the name of the importer or consignee.)" In the case of teas the Act declares, that the importer or importers, instead of giving bond with sureties in common form may have an option to give "his, her, or their bond" without sureties, accompanied with a deposit of the teas. In this case, then, the Statute expressly required the importer's bond.

There is in the same section a provision, that for the purpose of preventing frauds, arising from collusive transfers, all goods imported shall be taken to be, for the purposes of the Act, the property of the person, to whom they may be consigned. In this case, the defendant was both owner and consignee. It has been suggested, that this provision was intended only to apply to cases, in which importers, being debtors to the government, and so not entitled to new credits, should assign the property to others, who might be able to obtain credit for the duties. But the provision is general; and if even that evil were the particular inducement to the legislature to make it, still, being general, it is properly applicable to other mischiefs of a similar sort.

On the whole, therefore, it is submitted, on the part of the United States, that the defendant, by the importation of the goods, became personally indebted for the duties. That this debt accrued immediately upon importation, and before entry. That if he had given his own bond with sureties, according to the Act, it would not have extinguished the original debt without actual payment of the duties. That, at any rate, the defendant's original liability is not extinguished in this case, because his own bond was not given, and because the collector had no authority to take the bonds of other persons besides the importer.

The counsel then went into a discussion of the facts in evidence, to show even if the Court should be against them \*on the law, that there never was any real sale of the teas by the defendant to Lovejoy. And secondly, that when the collector received this bond, he supposed Lovejoy to be the importer of the teas, and therefore never voluntarily accepted it, even if he had authority to do so, in discharge of a debt of the defendant.

STORY J. (after summing up the facts.) In this case the United States ground their claim to recover from the defendant upon no peculiar rights growing out of their prerogative, but upon



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 United States v. Lyman.
 

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principles, which every citizen might justly apply to vindicate his own rights under similar circumstances. There are several questions of law, which have been learnedly and ingeniously argued; and upon which, having formed a most decided opinion, it is my duty to pronounce it.

The first question is, whether an action of debt lies in this case. By the Common Law, an action of debt is the general remedy for the recovery of all sums certain, whether the legal liability arise from contract, or be created by a Statute. And the remedy as well lies for the government itself, as for a citizen. And where the debt arises by Statute, an action or information of debt is the appropriate remedy, unless a different remedy be prescribed by the Statute.<sup>1</sup>

In respect to the duties payable upon the importation of goods, the usual proceeding, where no specialty has been taken as a security, is an information of debt, which is emphatically called the king's action of debt. But where a discovery, or account is wanted, either of the nature, or of the value of the goods imported, an exchequer information, in the nature of a bill in equity, for a discovery and account, \*is generally resorted to.<sup>2</sup> And \*499 informations of each kind are very common in cases, where goods have been smuggled, or where, by accident, mistake, or fraud, short duties only have been paid.<sup>3</sup> The general principle, upon which these informations rest, is, that in the given case the Common Law or the Statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the im-

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<sup>1</sup> *Bullard v. Bell*, ante, 243.

<sup>2</sup> *Hale* in *Harg. Law Tracts*, 216, 217. *Attorney-General v. Strangforth*, Bunb. R. 97. *Attorney-General v. Hatton*, Ibid. 262. *Attorney-General v. Jewers*, Ibid. 225. *Waller v. Travers*, Hard. R. 301. *Attorney-General v. —*, 2 Anst. R. 558.

<sup>3</sup> *Attorney-General v. Jewers*, Bunb. R. 225. *Salter v. Malapere*, 1 Roll. R. 382. *Attorney-General v. Strangforth*, Bunb. R. 97. *Attorney-General v. Chitty*, Parker R. 37.

portation; and that therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown. And it is a general rule in the construction of revenue Statutes, that if a duty is charged on any article, the word "charged" means, that the owner shall be personally debited with that sum.<sup>1</sup>

These doctrines fully apply to the case now before the Court. The Act of 27th of April, 1816, ch. 107, on which this action is founded, and which, in this respect, follows the language of the former Acts upon the same subject, declares, that "there shall be levied, collected, and paid, the several duties therein after mentioned" on the goods therein enumerated, when imported into the United States. And it has been repeatedly settled, both here and in England, that under such circumstances, the duties are a debt accruing to the government from the time of the actual  
 #500 importation.<sup>2</sup> And the importation is complete, as soon as \* the goods are brought within any port with the intention of being unladen or sold there.

From whom then does the debt accrue? Beyond all doubt from the importer, be he the owner, or the consignee of the goods; for by the express provisions of the Revenue Act of 1799, ch. 128, the owner or consignee, or, in case of his absence or sickness, his factor or agent, are the only persons entitled to enter the goods, and the only persons, to whom the law allows (as will be hereafter shown) a credit for the duties to be given at the Custom House. Immediately, therefore, upon the importation of these goods, the owner or importer owes a debt to the government, which, independent of any security by bond, it has

<sup>1</sup> *Attorney-General v. ———*, 2 Anst. R. 558.

<sup>2</sup> *Salter v. Malapere*, 1 Roll. R. 382. *Attorney-General v. Strayforth*, Bunb. R. 97. *Hale* in Harg. Law Tracts, 212, 213. *United States v. Vowell*, 5 Cranch R. 368. *The Mary*, 1 Gallis. R. 206. *United States v. Arnold*, 1 Gallis. R. 348. *S. C.*, 9 Cranch R. 104. *United States v. Prince*, 2 Gallis. R. 204.

a right to enforce by an action of debt upon the principles of the Common Law. To be sure, if a credit be allowable upon the duties, it is a *debitum in præsenti solvendum in futuro*. But I take it to be very clear, that no person can entitle himself to a credit under the Revenue Act of 1799, ch. 128, unless he gives bonds in the manner prescribed by that law.

It being then ascertained, that upon the principles of the Common Law an action of debt is the proper remedy for duties against the owner or importer, the next consideration is, whether a different remedy has been prescribed by any Statute of the United States. The argument of the defendant's counsel is, that by the Revenue Act of 1799, ch. 128, the duties were required to be paid, or secured by bond to be paid, before they were permitted to be unladen; and that this security by bond constitutes the exclusive remedy for the government for the recovery of the duties. I cannot yield the slightest assent to this argument. In the first place, the bond, if given, is not strictly and accurately speaking a statute remedy, but a statute security for the debt. A remedy, as understood in legal phraseology, is a mode prescribed by law to enforce a duty or redress a \* wrong, and not \*501 an obligation to guaranty a right, or to indemnify against a wrong. The remedy for the duties, when a bond is given and remains unpaid, is not, technically speaking, the bond itself, but a suit to enforce the payment of the bond. The technical rule, therefore, that where a statute remedy is given, it excludes the Common Law remedy by action of debt, does not apply; for the Statute prescribes no such remedy.

In the next place, the construction of the Statute, assumed by the defendant's counsel, involves this difficulty, that, if true, the government have no remedy, where no bond is taken. Now, by the terms of the Act no bond can be taken, where the duties do not exceed the sum of fifty dollars, (sec. 62); and if, by any mistake, accident, or fraud, that sum is not paid, can it be con-

tended, that the United States are without a remedy to recover it? Cases may easily be imagined of great inconvenience, if this doctrine were to prevail; and deeming a just and prompt collection of the revenue of the greatest importance, as well to the citizens as the government, I cannot believe, that any Revenue Act ought so to be interpreted, unless the interpretation be inevitable. Shall the importer, by his own illegal act, escape from the payment of a debt justly due to the government? Suppose by the purest accident, or mistake, no bond is taken for the duties, is the importer to be exonerated from all liability? Suppose a bond executed by an agent, and it turns out, that his authority had been revoked, or his principal was dead, is there no remedy against the principal or his representatives? Suppose, by mistake, the collector takes a bond for a sum less than the real duties, or for a less quantity of goods than is really imported, shall not the government recover for the short duties? It is clear, that if the collector were to take a bond for more than the legal duties, the importer would be entitled to redress; and why

\*502 not, in the converse case, the \*government also? I put these cases, because they are precisely the cases, where the government would be compelled to resort to the general action of debt; and they show, in a strong light, how little reason there would be, to put an interpretation on the Revenue Act of 1799, which would lead to such mischievous results. If there be nothing in the reason of the thing to support this interpretation, there seems to be as little in the language of the Statute to justify it. The Revenue Act of 1799, nowhere declares, that the duties shall not be due, unless bonds are taken for the payment. But, on the other hand, every section, touching the subject, speaks distinctly of the bonds, not as creating a right to the duties, but as a security for the payment of them. The distinction between a right, and the security of a right, is too obvious to require comment. Besides; it may be added, that the right to duties, grows,

not out of the Revenue Act of 1799, ch. 128, but out of the Duty Act of 1816, ch. 107. This latter Act makes the duties a personal charge on the importer upon the principles, which have been already stated, independent of any other Statute. Further; the importer is not compellable in any case to give bonds for the duties; but it is at his option to give bonds, or to suffer the government to take the goods into its own possession, to secure the duties. Yet the right to duties certainly does not arise from the possession of the goods, nor is it confined to the goods. If they are destroyed or lost, or become of less value than the duties after the importation, the government have still a right to the full duties. And the very terms of the Act of 1799, in cases of a deposit of the goods, prove them to be at the risk and expense of the parties, on whose account they are deposited.<sup>1</sup>

From all these considerations, I am without the slightest hesitation in pronouncing, that an action of debt well lies in \*favor of \*503 the government, to recover the duties levied under the Revenue Acts of the United States, independent of any bond which may be taken to secure them under the authority of those Acts.

Let us now apply the principles thus established to the present case. It is admitted, that the defendant was the owner of the teas at the time of their importation; and it follows, that he is indebted to the government in the sum stated in the declaration (which is the amount of the duties), and that the present action well lies against him for that debt, unless he can show a payment or extinguishment of it. No payment is pretended; but it is said, that there has been an extinguishment or satisfaction of the debt by the supposed purchase made by Lovejoy, and the acceptance of his bond for the duties at the Custom House, in lieu of the deposit of the goods.

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<sup>1</sup> Act of 1799, ch. 128, § 52, 56, 62.

It is to be recollected, that the supposed purchase by Lovejoy was made six days after the arrival and entry of the ship at the Custom House. And the first question that meets us, is, whether any sub-purchaser, after the importation of the goods, has a right to enter the goods and secure the duties at the Custom House? The language of the Revenue Act of 1799, ch. 128, in every section bearing on this subject, most distinctly confirms the right to enter the goods to the owner or consignee, or, in case of his absence or sickness, to his agent or factor. And the very terms of the oath taken on this occasion, as well as the terms of the duty bond, expressly declare the party to be the importer in the character of owner or consignee. And the 62d section of the Act further declares, that "to prevent all frauds arising from collusive transfers, all goods, wares, and merchandise, imported into the United States, shall, for the purposes of this Act, be deemed and held to be the property of the persons to whom the said goods, &c. may be consigned, any sale, transfer, or assignment \*504 \* prior to the entry and payment, or securing the payment of the duties on the said goods, &c. and the payment of all the bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding." If in this case Lovejoy had become a purchaser or consignee, while the ship was *in transitu*, there might have been weight in the argument, that he had a right to enter the goods. But he was in no sense the importer of the goods, having become (if at all) a purchaser after the importation; and therefore, he had not, within the terms of the Act, any authority to enter the goods. It is quite another question whether, having entered the goods as importer, he is not estopped to deny his own liability to pay the bonds into which he has entered.

But the Court has been pressed with the usage, which has very extensively, and without question very innocently prevailed, to allow sub-purchasers, after importation, to bond the goods at the Custom House, in lieu of the original importers. It is a sufficient

answer to this statement, that no usage can prevail against the clear and unambiguous terms of the law. The Collector is but a mere ministerial officer. It may be his misfortune, or the misfortune of the public, that he misinterprets the law; but certainly he cannot alter it. If it be inconvenient that sub-purchasers should not be permitted to bond goods at the Custom House, it lies with the Legislature, and not with Collectors or Courts of Justice, to administer the proper relief.

The Collector then, in this case, had no authority to admit Lovejoy to enter the goods, or give bond for the duties. The whole proceeding was irregular, and not binding upon the United States. I do not say, that the bond was absolutely void; for it did not lie in the mouth of Lovejoy to contest it, after having admitted and sworn himself to be the importer liable to pay the duties. But the receipt of the bond by the Collector was no estoppel to the United States, since no act of his, not within the scope of the law, could vary their rights.

\* In this view of the case, the bond of Lovejoy was no extin- \*505  
guishment of the original debt of the defendant for duties: 1st. Because Lovejoy was not the importer entitled to give it. 2dly. Because the Collector is not authorized to receive the bond of a third person in extinguishment or satisfaction of any duties due by the importer. And 3dly. Because the bond was in fact received by the Collector, not in extinguishment of any debt supposed to be due from the defendant to the United States, but, under a mistake of the law, as security for the duties supposed to be due and payable by Lovejoy.

But I am prepared to go yet farther, and to hold that a bond given under the Revenue Act of 1799, by the importer himself, and *a fortiori* by a third person (if legal) would not extinguish the original debt created by the Act of Importation.

I admit the doctrine, that in general a higher security taken from the debtor himself extinguishes the original contract. But

this proceeds upon a presumption of law, that it is taken in satisfaction of the original debt; for if it appear otherwise upon the face of the security, it will not operate as an extinguishment. Thus, a bond of the debtor with sureties, or a mortgage, may be taken as collateral security for the payment of a promissory note; and in such case it certainly does not extinguish the demand on the note. It is, therefore after all, a mere question of intent; and the law, in the absence of all other evidence of the intent, construes the higher security of the debtor himself, as an extinguishment, because it gives a higher remedy. I admit, also, that a higher security of a third person, if taken at the time of making the original contract, or afterwards, in satisfaction of the debt, operates as an extinguishment.<sup>1</sup> But there is this difference between the case of a higher \*security of the debtor himself, and  
 \*506 of a third person, that in the latter case the law does not presume the security to be taken in satisfaction, unless it is averred and proved to be the agreement of the parties so to consider it. Whether the receiving of a higher security from one partner for a partnership debt be an extinguishment, unless expressly taken in satisfaction of such debt, may perhaps admit of some doubt, notwithstanding the language of some highly respectable authorities.<sup>2</sup> It is not, however, material to consider this point, for the present is clearly not the case of a partnership.

On the other hand, I admit, according to the authorities cited,<sup>3</sup> that an action of debt founded on a Statute is to be considered as an action founded on a specialty. But I cannot admit, that it fol-

<sup>1</sup> 3 Bac. Abr. *Extinguishment* (D.) *Hooper's case* and *Pudsey's case*, 2 Leon. 110. *Banorjee v. Hovey*, 5 Mass. R. 11.

<sup>2</sup> *Tom v. Goodrich*, 2 Johns. R. 213. *Sluby v. Champlin*, 4 Johns. R. 461. *Clement v. Brush*, 3 Johns. Cas. 180. *et vide Drake v. Mitchell*, 3 East R. 251.

<sup>3</sup> *Fuwkeners v. Bellingham*, Cro. Car. 81. *Jones v. Pope*, 1 Saund. R. 37. *Hodsdon v. Harridge*, 2 Saund. R. 64. *Pease v. Howard*, 11 Johns R. 479.



lows, that it is a debt of equal dignity with a debt due by bond. There may be different grades, even in respect to debts due by specialty; and I cannot consider a debt due for duties, as of a higher dignity than a simple contract debt due to the crown, which is clearly subordinate to all debts due on specialties, technically so called.<sup>1</sup>

My opinion, therefore, that a bond taken under the Revenue Act of 1799, is not an extinguishment of the debt, accruing by the importation of the goods, is founded, not upon the notion, that the debts are of the same nature and dignity, but upon the intent and language of the Statute itself. It provides, that within fifteen days after the arrival of the goods the importer may enter the goods, pay the duties at once, or give bond, with sufficient sureties, to secure the payment of the duties at a future period; or \* otherwise, the goods are to be deposited in the stores of the government, as a security for such payment.<sup>2</sup> The government, therefore, has a lien upon the goods from the time of their importation for the amount of the duties; and it cannot, for a moment, be admitted, that the existence of this lien extinguishes the original debt. It is clearly collateral thereto; and the government may relinquish its lien on the goods without in any way affecting its right to the duties. The option given to the importer to substitute a bond with sureties in lieu of a deposit of his goods is with a view to relieve the goods from the lien for duties, and enable him to dispose of them freely in the market. The law, therefore, so far from intending to extinguish any existing debt, means no more than to substitute one species of security for another. And throughout the whole Act, the bond is uniformly termed a bond to secure the duties, and not a bond in payment of the duties. If, therefore, the Statute intended the bond as a

<sup>1</sup> Toller's Law of Executors, B. 3, ch. 2, § 1, 2, 3.

<sup>2</sup> Act of 1799, ch. 122, § 36, 49, 62.

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The Anne.

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mere security for the duties, (and this intention is proved irresistibly to my mind,) there is an end to the whole question; for in no case can a higher security operate an extinguishment against the plain import of the Statute, under which it is taken.

It is not, however, necessary in this case to contend for so broad a doctrine, though I cannot discern any incorrectness in it. For, at all events, if Lovejoy were a real purchaser, his bond, given at the Custom House, would be considered only as the security of a third person for the proper debt of the defendant, which would not *per se* extinguish the debt; and the Collector had no authority to receive it expressly in satisfaction. And, on the other hand, if Lovejoy were a pretended purchaser only, then the defence cannot, in any possible view, be sustained consistently with the principles of law.

*Verdict for the United States for the whole amount of duties.*

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\*508 \*THE SCHOONER ANNE, GEORGE MANNERS, ESQ. CONSUL,  
CLAIMANT.

The Admiralty has jurisdiction *in personam*, as well as *in rem* for pilotage earned in piloting ships to, from, or on, the sea.

To make pilotage a lien on the ship, the contract must have been made by some person in the employment of the owner, duly authorized to make the contract, such as the master, or the *quasi* master. But mere wrongdoers or mutineers have no authority to bind the ship.

Upon the facts, the pilotage in this case, though meritoriously earned, held not to be a charge on the ship.

THIS was a libel brought to recover a compensation for piloting the British schooner Anne, from Brown's Bank near the American coast, to Boston. The material facts proved on the trial were shortly these:—The Anne was chartered in June, 1818, at Cork, in Ireland, to proceed from thence to Quebec with pas-

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The Anne.

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sengers. On the 10th of June she sailed from Cork with upwards of sixty passengers on board, ostensibly destined for Quebec. Being obliged to put into Padstow and St. Ives, in consequence of bad weather and some injury done to the vessel, she there dismissed as many passengers as exceeded the number limited by law to be carried out of Great Britain in a vessel of her burden, and again proceeded on her voyage on the 16th day of July. After being out some time, the passengers, amongst whom was a son and daughter of the charterer of the vessel, required of the master, that instead of going to Quebec, he should carry them either to New York or Philadelphia; alleging that they had contracted with the charterer to be landed at one of those ports. The master refusing to comply with their request, on the 17th of August they arose upon him in a body, took the vessel out of his possession, drove him with some violence and threats to the cabin; and having compelled the mate (who was made a defendant in this case) to take an oath, that he would carry the vessel into one of the \*abovementioned ports, or into \*509 the port of Boston, put him in command.

Shortly after this transaction, they began to fall short of provision; and after being upon a very small allowance for many days, and suffering great anxiety from the fear of starving, they fell in at sea with the *Reindeer*, a small fishing schooner, and obtained from her a supply of provision, and also prevailed upon the libellant, one of her crew, to pilot them into Boston. After arriving there, the mate and crew refused to pay the pilotage, upon the ground that it was a charge against the ship, and the master ought to pay it; and the master refused, alleging that the libellant came on board the *Anne* at the request of the mate and passengers, who were at that time in command of the vessel; that he made his contract with them, and must now look to them for its fulfilment.

The case was argued by *Blake*, District Attorney, and *Blair*, for the libellant; and *W. Sullivan* for the claimant.

STORY J. A preliminary exception has been taken to the jurisdiction of the Court in this cause, upon the ground, that no suit lies in the Admiralty for pilotage, even when the service has been performed on the high seas. It is very true, that the Courts of Common Law have held, (whether rightly in the full extent, is matter with me of extreme doubt) that if the contract be for services to be performed on a navigable river within the body of a county, no suit lies in the Admiralty in favor of the pilot for such services.<sup>1</sup> And the High Court of Admiralty, under the imposing authority of prohibitions, has felt itself compelled to follow, with hesitating steps, in the narrow path thus \*510 prescribed by the common law.<sup>2</sup> But there never has \*been, as far as I know, a judicial doubt breathed anywhere of the rightful jurisdiction of the Admiralty over suits for pilotage on the high seas. And, in point of fact, suits of this nature have been, and are continually entertained by the Admiralty.<sup>3</sup> Even in times of the most severe hostility, the Courts of Common Law admitted, that the Admiralty had jurisdiction over contracts made upon the sea to be performed upon the sea; and if there ever was a case, which came exactly within the terms of this description, it is the present; for the contract was made upon the sea to pilot the vessel into some port of the United States, she being then at least three days' sail from land. But if this were a perfectly new case, unaided by authority, I should still hold that the Admiralty had upon principle a rightful jurisdiction, as well *in personam* as *in rem*, for pilotage due for services performed on, from, or to the sea; since it properly arises under a maritime contract, and differs in no substantial respect from the contract for mariner's wages. We may, therefore, safely dismiss this objection.

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<sup>1</sup> *Ross v. Walker*, 2 Wils. R. 264. Abbott on Shipp. P. 2, ch. 5, p. 183.

<sup>2</sup> *The Eleanor*, 6 Rob. R. 39.

<sup>3</sup> *The Nelson*, Ibid. 227.

Upon examining the testimony in this case, which is extremely contradictory in many material respects, I cannot say, that the conclusion drawn by the District Judge, as to the real state of facts, is not fully warranted by a decisive weight of evidence. Admitting that the original voyage was to Quebec, and not to the United States, 'it is difficult to resist the impression, that the master did, in common with the passengers, feel the services of the pilot to be very desirable, if not absolutely necessary. And the pilot was noways reluctant in complying with the wishes of the parties, if he could be made perfectly secure of his stipulated pilotage. It cannot be disguised, also, that there is no inconsiderable probability, that the intention of some of the parties, and at least of the charterer, was, that the ostensible \*voyage to Quebec \*511 should terminate in a real voyage to the United States. And the provisions of the Statutes of 43 Geo. 3, ch. 56, and 57 Geo. 3, ch. 157, restricting British, as well as foreign vessels, to a very small number of passengers, when bound to the United States, and allowing a very large number, when bound to the neighbouring British Provinces, afford a very strong color to this supposition. Many circumstances, too, admit of an easy explanation in this way, which would otherwise be wrapt up in marvellous mystery and difficulty. In this view, the supposed mutiny, if not the effect of pre-concert, was not so much at variance with the wishes of any of the parties, as to involve any serious opposition, or inflame any very atrocious passions. The master might not have had any very sincere reluctance to acquiesce in a scheme, which he had no particular interest to oppose, even if he had not been previously consulted, as to the change of destination. To be sure, the case under this aspect involves a meditated fraud upon the British laws. But this Court is not at liberty to enforce the municipal regulations of a foreign country, or to take cognizance of any frauds attempted on them. I confess that I have always been a good deal staggered by this doctrine. It has appeared to

me more consonant with national comity, sound morals, and public justice, that Courts of all countries should lend their aid to discountenance frauds upon the revenue laws of other countries, and decline to enforce any agreements entered into for the purpose of evading those laws. An exception might very properly apply, where those laws were in direct hostility to our own policy or laws, or were inconsistent with the principles of general justice. But the rule is now too stubborn to be controlled, and has been so long established, that it has become almost a *formula* in our text-books.<sup>1</sup> \* And, indeed, if the contrary doctrine existed, I do not perceive, that it could materially bear on the present case; because there is no pretence to say, that the pilot connived at the supposed mutiny or change of destination; and his services were really beneficial, and rendered *bonâ fide* for the common benefit. It was certainly not for him nicely to scan the various rights or duties of the parties; and it would be strange, if services, humanely rendered, were to be treated as crimes, not from any misconduct in the pilot, but from the relief having been afforded to persons, who had brought themselves into distress by their own previous misconduct. I can have no doubt, that the pilot has rendered a meritorious service, and is entitled to a just compensation from some of the parties.

But the principal question remains to be considered, and that is, against whom is the pilotage a rightful charge? The original suit began by a petition *in personam* against the mate, (who at the time of the contract acted as master, the master having been suspended in the command by the asserted mutinous acts of the passengers) and prayed process as well against him as against

<sup>1</sup> See Marshall on Insur. B. 1, ch. 3, § 1, and 1 Valin, Comm. art. 49, p. 127. Pothier, Traité D'Assur. n. 58. 1 Emerig. 212, 215. *Planche v. Fletcher*, Doug. R. 251. *Lever v. Fletcher*, Park. Insur. R. 313, (6th edit.) *The Courtney*, Edw. R. 239. *The Leander*, Edw. R. 35. *The Fortuna*, 1 Dods. R. 81. *The Amedie*, Ibid. 84, note.

the ship. Subsequently process was duly issued against the ship; and thereupon the original master, the mate, and the British consul for the owners, severally appeared, and put in a defensive allegation. Whether a proceeding *in personam* and *in rem* can be regularly combined, so as to entitle the libellant to a decree *in personam*, if he fails to establish his claim *in rem*, need not here be decided; because the parties have, by their own proceedings, waived any question on this head, and confined the ultimate process to the ship only; and if it cannot be maintained against the ship, there must be a dismissal of the present suit.

\* To make the pilotage a charge on the ship itself, or on the owners, there must be in cases of this nature (for I speak not of pilotage connected with, and forming a part of salvage services) an express or implied contract with the owner, or with his authorized agent. The master is for this purpose an authorized agent; and upon his death or absence the same authority devolves upon the next person properly succeeding to the master in the command of the ship. But it certainly cannot be maintained, upon any acknowledged principles of law, that mere wrongdoers or usurpers of the command of the ship, not acknowledged or appointed by the owner, can create a lien on the ship, or personally bind the owner by a contract, which they may choose to make, whether it be beneficial to him or not. *A fortiori*, a criminal usurpation of authority, or a piratical revolt, cannot afford any foundation for a title, which is to bind the ship or owner. \*513

In the cause now before the Court, if the transaction is to be taken, as a case of real mutiny, in which the master was forcibly deprived of his lawful authority, and driven from the command of the ship, neither the passengers nor the mate, who succeeded by the appointment of the passengers as master, had competent authority to enter into any contract binding upon the owner; no

more, indeed, than any pirate or roving plunderer upon the ocean. If, on the other hand, it is to be taken as a merely feigned and fictitious proceeding, it becomes material to ascertain whether the master, in point of fact, entered into the contract directly or impliedly on his owner's account. For, if the contract, though for the benefit of the ship, was made by the pilot, under a knowledge of all the circumstances, with other persons on their own personal responsibility, I do not see how, because they have failed to perform it, a resulting security falls on the ship. Now, it is very remarkable, that the evidence, sufficiently

\*514 discordant in other most important \* particulars, is uniform in this, that the master utterly refused (no matter, whether in pursuance of a preconcerted plan or not) to be accountable for the pilotage. It is very true, that he seems to have been desirous to retain the pilot; but at the same time he explicitly disavowed any agency in the transaction, and gave full notice, that the pilot was to look, not to him, but to the passengers for his recompense. The passengers did accordingly agree to pay it; and the pilot, trusting to their good faith, and, as I am persuaded, notwithstanding the pretence of violence, noways loth, engaged in the duty. The passengers have abused his confidence, and most disgracefully refused him a recompense, which he justly earned; and if any of them were before the Court, I should not hesitate a moment in awarding him, as against them, the fullest compensation. It is no very welcome proof of the morality or gratitude of these emigrants thus landed in safety on our hospitable shores, that they should signalize themselves by a paltry artifice to evade a meritorious debt. But how can the Court say, under these circumstances, that a contract explicitly declined (as the libellant himself admits) by the master, who alone had authority to bind the ship, and as explicitly entered into with the passengers, is to be deemed a debt due from the owner? The question is not, whether the owner has been ultimately benefited by the service;



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but whether he has contracted the debt. It is material also, that the libellant does not in any part of his allegation assert, that any contract was made by the original master; (and if he did, his own testimony would disprove it;) but his claim against the ship is rested on the retainer of the mate, then acting as master. The conduct, too, of the pilot, after the arrival of the *Anne* in port, evinces in a strong manner his own understanding, that he had no claim on the original master, and consequently no claim through him upon the ship itself. Upon the whole I cannot say, that \*there is sufficient evidence to warrant me in holding, that \*515 the pilotage in this case ought to be a lien on the ship; and with the utmost respect for the opinion of the District Court, I am compelled to pronounce, that its decree must be reversed. Considering however all the circumstances, I shall direct the reversal to be without costs to either party.

*Decree reversed.*

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**SAMUEL HUGHES, PLAINTIFF IN EQUITY, v. GEORGE BLAKE.**

Upon a hearing on an issue on a plea in bar to a bill in Chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact.

The defendant's answer in support of his plea is good evidence; and unless disproved by two witnesses, or by one witness and very strong circumstances, it must prevail in his favor.

Under what circumstances a plea of a former judgment at law for the same cause of action, is a good bar in equity.

**T**HE object of the bill was to recover from the defendant a sum of money arising from the sale of a tract of land, commonly called Yazoo lands, alleged to have been effected by the defendant, in the year 1795, as agent of certain persons named in the bill, in which lands the plaintiff claimed to have had an equitable

interest, in common with the defendant's immediate principals, and, therefore, as being entitled to a proportion of the proceeds resulting from the sale thereof. It was also charged by the bill, that the defendant had rendered himself distinctly liable for a specific sum of money in virtue of a certain order, having reference to the plaintiff's concern and interest in the lands alluded to, drawn by one Gibson in September, 1796, in favor of the \*516 plaintiff, and accepted by the defendant with certain \* modifications and conditions, as particularly expressed in the acceptance.

The defendant pleaded in bar, both to the relief and discovery sought by the bill, a former verdict and judgment rendered in his favor after a full trial, at the Supreme Judicial Court for the Commonwealth of Massachusetts in November, 1810, on a suit at law, commenced against him by the present plaintiff in equity in the year 1804, being long before the exhibition of the present bill, for the same identical causes of action; and denied by the plea, and by his answer given in support of the plea, all the frauds alleged in the bill, and also that any new material evidence, as therein was alleged, had been discovered by the plaintiff subsequently to the rendition of said judgment.

To this plea the replication of the plaintiff was the general one in common form, without any impeachment of the record of the former judgment.

The cause was argued by *Gorham* and *D. Davis*, Solicitor-General, for the plaintiff; and by *Blake*, District Attorney, and *Webster*, for the defendant.

On the trial the identity of the causes of action, without the aid of collateral proof, appeared, very clearly, from a comparison of the matters set forth in the bill, with the averments contained in the several counts (eight in number) of the plaintiff's writ; it appearing moreover, that in the trial at law the plaintiff had submitted to the Jury, in support of those counts, the depositions of

the same witnesses, on whose evidence he now relied for the maintenance of his present bill.

The principal question arising from this state of the case, related to the subject of a certain negotiation respecting the lands before mentioned, alleged in the plaintiff's bill to have taken place between the defendant and one Williams, in the winter of 1814. With regard to the nature of this negotiation, the statement contained in the deposition \*of Williams, which con-<sup>\*517</sup>stituted the only evidence pretended by the plaintiff's counsel to have come to his knowledge, since the rendition of the judgment at law, was explicitly denied by the defendant in his plea, and by his answer under oath in support of the same. Under these circumstances it was insisted, that the evidence of this single witness, (Williams) even if the facts stated by him were material, (which also was utterly denied,) unsupported as his statement was by any corroborative circumstance, and opposed, indeed, as the counsel for the defendant contended it was, by all the presumptions arising from the nature of the case, could not be received according to the established rules in equity, as sufficient ground for going behind the judgment, and admitting the plaintiff to a second trial of the original merits of his case.

On the part of the plaintiff it was however argued, that owing to a want of technical accuracy in framing his declaration in the suit at law, all the counts therein contained, excepting only the general money counts were radically defective; that neither of them was sufficient to embrace the entire merits of the case set forth in the present bill; and hence, that any judgment, which might have been rendered thereon in his favor, would have been erroneous and voidable, and consequently, that the judgment now appearing against him, could not be considered a legal bar to his present suit.

On the other hand, the soundness of this position, both with regard to the supposed defectiveness of the declaration, and the

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legal consequences resulting therefrom in case such defect had appeared in reality to exist, was totally denied by the counsel for the defendant.

**STORY J.** No question arises in this case on the sufficiency of the plea in point of law ; for the parties, by going to issue on the facts alleged in the plea, have waived \* all considerations of this nature.<sup>1</sup> It remains, therefore, for the Court only to ascertain whether the plea is supported in point of fact.

It is admitted by the plaintiff, that the defendant has never received any money on account of the Barrell notes, since the former suit in 1804 was instituted against him. All, that he ever received, was prior to that time. It is also admitted by the plaintiff, that he has no new evidence to offer in support of his original cause of action, beyond what he knew and used in the former suit, except so far as grows out of the compromise made by the defendant at Washington with Mr. Williams, in 1814. As to this compromise, the defendant in his answer in support of his plea, expressly denies, that he ever received any allowance from Williams under that compromise, on account of his liability as bail for Gibson, as charged in the bill. This denial is sufficient to support the plea, unless it is disproved by two witnesses, or by one witness and by other circumstances, which ought to outweigh the defendant's answer on oath. The only witness to sustain the plaintiff's charge is Mr. Williams ; and without going farther into the evidence, I do not think his testimony, uncorroborated as it is, can be admitted to have this effect. The grounds of equitable relief averred in the bill being thus removed, the only remaining question is, whether the causes of action in the former and present suit are the same. It seems to me perfectly clear, that they are. Some technical objections have been

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<sup>1</sup> Mitf. Pl. 240. Cooper's Eq. Pl. 232.

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taken to some of the counts in the declaration in the former suit, which, it is said, would have justified the former verdict, independent of any examination of the merits. It is said, that in five counts on the special contract, there is no averment, that any proceeds of the Barrell notes had ever been received by the defendant. But assuming, that these counts were defective, in not averring a \*breach of the promise to account for the proceeds of \*519 these notes, and alleging, that some money had been received as the proceeds thereof, it is very clear, that the Jury could not, under the general issue, have found a verdict for the defendants for this defect. For, if the promise was proved as laid, then the verdict must have been for the plaintiff, although for the defect in the declaration, the latter might have been held bad on demurrer; or judgment might have been arrested; or the judgment reversed for error. I do not say, that these counts were so defective, that if judgment had passed for the plaintiff, the defendant might have reversed it for error. That is a question, not now necessary to be considered. But I cannot doubt, that if judgment had passed for the plaintiff, and the defendant had paid the money on such judgment, that the defendant might now plead that judgment in bar for the same cause of action, while unreversed, notwithstanding the defect. And if so, I do not perceive, why the defendant also is not entitled to plead a judgment on the same counts in his own favor. Where a cause has been tried on the merits, and judgment has passed thereupon for either party, such judgment, while it remains in force, must be a bar to any other suit for the same cause of action, though the declaration be so imperfectly drawn, that it would not stand the test of a demurrer. Suppose a payment were specially pleaded to such defective declaration, and found for the defendant, would it not be a bar to a second suit? I agree, that it must in such case appear, that the trial was on the merits; for if the cause went off on the technical defect, it would in effect negative the aver-

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ment, that the causes of action were the same. Here it is clear, that the whole merits were in fact tried ; and, so far as I can comprehend them, they might at all events, legally be tried upon the count for money had and received, which is clearly well drawn.

The plea must be adjudged to be proved, and a decree entered of a dismissal of the bill.

# CIRCUIT COURT OF THE UNITED STATES.

## Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1818, AT PROVIDENCE.

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BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.  
          { Hon. DAVID HOWELL, District Judge.

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### WHITE v. FENNER.

The Circuit Court has no jurisdiction of suits between citizens of different States, except where one of the parties is a citizen of the State, where the suit is brought.

**ASSUMPSIT.** The plaintiff was described in the writ as a citizen of Virginia, and the defendant as a citizen of New York. The defendant at the time of the service of the writ upon him was in Rhode Island, and was there arrested.

*Searle*, for the defendant, moved the Court to dismiss the suit for want of jurisdiction, the defect being apparent on the face of the writ. And he cited, as decisive of the point, the eleventh section of the Judicial Act of 1789, ch. 20.

*Tristram Burgess* argued for the plaintiff, *e contra*.

*By the Court.* This Court has no jurisdiction, which is not given by some Statute. The 11th section of the Judicial \* Act \*521 of 1789, ch. 20, declares, that the Circuit Court shall have original cognizance, among other cases, of suits "between a citizen

of the State, where the suit is brought, and a citizen of another State." No clause of this or any subsequent Act has enlarged this jurisdiction, so as to embrace the present case. The Constitution declares, and it is manditory to the Legislature, that the judicial power of the United States shall extend to controversies "between citizens of different States"; and it is somewhat singular, that the jurisdiction actually conferred on the Courts of the United States should have stopped so far short of the constitutional extent. That serious mischiefs have already arisen, and must continually arise from the present very limited jurisdiction of these Courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them. The language of the Act is so clear, that there is nothing on which to hang a doubt. Neither of the parties in this suit is a citizen of the State; where the suit is brought. The suit must, therefore, be dismissed.

*Suit dismissed.*



# APPENDIX.

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SKETCH OF THE LIFE AND CHARACTER

OF THE

HON. SAMUEL DEXTER, L. L. D.

BY THE

HON. MR. JUSTICE STORY.

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[This Sketch formed the concluding part of a Charge delivered to the Grand Jury at the Circuit Court holden at Boston, in the District of Massachusetts, in May, 1816, and was then published at the joint request of the Grand Jury and the members of the Bar of the Circuit Court. It is here reprinted with a view to preserve in a more permanent form the character of that distinguished statesman and lawyer.]

**I** HAVE now finished the brief review of those offences, which are most important in the criminal code of the United States. And happy should I be, if I could congratulate you on the peace and general prosperity of our country without mingling emotions of a painful nature. But how is it possible to enter this hall of justice and cast my eyes among my brethren at the bar, without missing one, who, for many years, has been its distinguished ornament?

On ordinary occasions of the loss of private or professional friends, we may properly bury our sorrows in our own bosoms. In such cases the public do not feel that deep sympathy, which authorizes us to speak aloud our anguish and disquietude. But when such men as Mr. Dexter die, the loss is emphatically a public loss, and the mourners are the whole nation. To give utterance to our feelings is therefore a solemn duty. It is fit, that the example of the great and good should be brought for-

ward for the imitation of the young and ambitious ; that gratitude for eminent services should find a voice as public as the deeds ; and that exalted genius, when it had ceased to attract admiration by living splendor, should be consecrated in the memories of those whom it has instructed or preserved.

I feel assured, therefore, that I am not stepping aside from the path of duty, or pressing unduly upon your attention, by devoting a few minutes of your time to a sketch of the history and character of this illustrious lawyer and statesman.

Mr. Dexter was descended from a highly respectable parentage. His grandfather was a clergyman. His father, the Hon. Samuel Dexter, was a merchant, and resided many years at Boston, where his son Samuel was born in the year 1761. The father early distinguished himself in the struggles between the crown and the people of Massachusetts previous to the Revolution ; and for his public services was several times elected to the Council by the House of Representatives, and as often rejected by the Royal Governor of the Province. He was at length admitted to a seat in the Council by the prudence or the fears of the Executive ; but in 1774 was again negatived "by the express command of his Majesty." Towards the close of his life he retired altogether from public affairs, and engaged in a profound investigation of the great doctrines of theology. At his death he bequeathed a handsome legacy to Harvard University for the encouragement of biblical criticism ; and upon this honorable foundation the Dexter Lectureship has since been established.

Mr. Dexter, the son, after the usual preparatory studies, was matriculated at Harvard University in 1777, and received his first degree of bachelor of arts in 1781. During his residence at the University he gave ample promise of those talents, which shed so much lustre on his riper years. At a public exhibition, he delivered a poem, which was at that time received with great applause, and is still considered as highly creditable to his taste and judgment. On receiving his degree he was selected for the

first literary honors in his class, which he sustained with increasing reputation.

He now determined to engage in the profession of the law, a science, whose acute distinctions and logical structure were wonderfully adapted to invigorate and develope the powers of his understanding. He passed the usual preparatory term at Worcester, under the tuition of the Hon. Levi Lincoln, then an eminent counsellor at the bar, and since Lieutenant-Governor of the Commonwealth. During this period, and for several years after his admission to the bar, Mr. Dexter devoted himself with unceasing assiduity to acquire the elements of law; and, as may be easily supposed from his great abilities, he was completely successful in his purposes. Notwithstanding many discouragements of a public nature, which, at that time, pressed heavily on young lawyers, Mr. Dexter rose rapidly into professional notice, and soon found himself surrounded with clients and business. In a short time he was chosen to the State Legislature; and his sound judgment and comprehensive policy gave him great weight and influence in all the deliberations of that body. From the State Legislature he was transferred to the Congress of the United States, being first elected to the House of Representatives, and afterwards to the Senate, by the suffrages of his native State. Perhaps there has been no period since the establishment of the government, which more imperiously demanded all the foresight, virtue, and discretion of the ablest statesman, than that in which Mr. Dexter was called to assist in the national counsels. The first talents in the respective parties, which then divided the country, were drawn into Congress. The floors of the two houses become a vast amphitheatre, on which the struggles for political power and principle were maintained with all the eloquence of rhetoric, and strength of reasoning, which the zeal of party could enkindle in noble minds. The most deep and impassioned feeling took possession of the nation itself; and the same thrilling sensations, which agitated Congress, electrified

the whole continent. It seemed, as if every power of the human mind was summoned to its proper business, and stretched to the most intense exertion. Many of you can recall the emotions of those days; and to those of us, who were then reposing in academic shades, the light that burst from the walls of Congress, seemed reflected back from every cottage in the country. At no period of his life did Mr. Dexter more completely sustain his reputation for extraordinary talents. His clear and forcible argumentation, his earnest and affecting admonitions, and his intrepid and original developement of principles and measures, gave him a weight of authority, which it was difficult to resist. Perhaps no man was ever heard by his political opponents with more profound and unaffected respect.

Mr. Dexter resigned his seat in the Senate on his appointment as Secretary of War under the administration of President Adams. He next received the office of Secretary of the Treasury; and during a short period of vacancy discharged also the functions of the Department of State. These were to Mr. Dexter new and untrodden paths. The habits of his life, and the pursuits of his mind were ill suited to that minute diligence and those intricate details, which the business of war and finance unavoidably impose upon the incumbents of office. He felt a great reluctance to engage in such employments, for which he professed no peculiar relish, and in which his forensic discipline and senatorial experience might not always guide him to correct results. His acceptance of these high stations was not therefore without much hesitation; but having accepted, he immediately employed the whole vigor of his mind to attain the mastery of all their multifarious duties. That he fully accomplished his purposes can be no surprise to those, who knew him. Such was his intellectual capacity and discrimination, that what he had the wish to acquire cost him far less, than any other man. The readiness, with which he received knowledge, seemed at times almost like instantaneous inspiration. He did not often choose to en-

gage in laborious inquiries ; but he had the necessary firmness and perseverance to attain, whatever was essential to his ambition or public duties.

Towards the close of Mr. Adams's administration he was offered a foreign embassy, which he declined ; and upon the accession of Mr. Jefferson to the presidency he resigned his public employments, and returned to the practice of the law with unabated zeal. From this period he engaged less in political controversies ; and reserved himself principally for professional or theological researches. He had always accustomed himself to an independence of thinking upon all subjects, legal, political, and religious. He subscribed to no man's creed ; and dealt in the dogmas of the school of no master ; but he examined, and weighed, and decided every thing for himself. He observed, or thought he observed, that parties were gradually changing their policy and principles ; and on this account he seems to have felt less desire to engage in controversies, where his judgment and political friendships might not always be reconcilable. On two memorable occasions, which are yet fresh in our recollections, he took an active political part. I refer to his opposition to the embargo and non-intercourse system, and his support of the late war. But, except in these instances, he rarely, if ever, appeared after his return to the bar, as the strenuous advocate or opposer of any of the great political measures, which agitated the nation. It was not that he looked on with indifference, or sought to evade responsibility by equivocation or reserve. On the contrary, he was always frank, communicative, and decided. But his judgment was so little in unison with the wishes of any party, that he expressed his opinions, rather as guides of his own conduct, than from a hope to influence others. He was as incapable of deceiving others, as he was of deceiving himself ; and would rather surrender the popularity of a whole life, than submit his own judgment to any sect in Church or State.

It is not unusual for men of eminence, after having withdrawn

a few years from the bar, to find it difficult, if not impracticable, to resume their former rank in business. Nothing of this sort occurred to check the progress of Mr. Dexter. He was immediately engaged in almost all important causes in our highest Courts ; and popular favor seemed to have increased rather than diminished during his temporary retirement. From the triumphs and victories of the State bar, his reputation soon carried him to the Supreme Court of the United States, where it has been my pride and pleasure, for many years, to see him holding his career in the foremost rank of advocates. This would entitle him to no ordinary praise ; for that bar has been long distinguished by the presence of many of the most illustrious lawyers in the Union.

In no situation have the admirable talents of Mr. Dexter appeared with more unclouded lustre, than in his attendance on the Supreme Court at Washington. For several years he passed the winters there under engagements in many of the most important causes. Rarely did he speak without attracting an audience composed of the taste, the beauty, the wit, and the learning, that adorned the city ; and never was he heard without instruction and delight. On some occasions involuntary tears from the whole audience have testified the touching powers of his eloquence and pathos. On others a profound and breathless silence expressed more forcibly, than any human language, the riveted attention of an hundred minds. I well remember, with what appropriate felicity he undertook in one cause to analyze the sources of patriotism. I wish it were possible to preserve the whole in the language, in which it was delivered. No one who heard him describe the influence of local scenery upon the human heart, but felt his soul dissolve within him. I can recall but imperfectly a single passage, and, stripped of its natural connexion, it affords but a glimmering of its original brightness. "We love not our country," said the orator, "from a blind and unmeaning attachment, simply because it is the place of our

birth. It is the scene of our earliest joys and sorrows. Every spot has become consecrated by some youthful sport, some tender friendship, some endearing affection, some reverential feeling. It is associated with all our moral habits, our principles, and our virtues. The very sod seems almost a part of ourselves, for there are entombed the bones of our ancestors. Even the dark valley of the shadow of death is not without its consolations, for we pass it in company with our friends." In a still more recent instance, and indeed in one of the last causes he ever argued, he took the occasion of an appropriate discussion, to expound his own views of the constitution, and, dropping the character of an advocate, to perform the paramount duty of a citizen. He seemed, as if giving his parting advice and benedictions to his country, and as if he had worked up his mind to a mighty effort to vindicate those solid maxims of government and policy, by which alone the union of the States might be upheld and perpetuated. It is deeply to be regretted, that his just and elevated views are now confined to the frail memories of those, who heard him.

In the spring of 1815, Mr. Dexter was requested by President Madison to accept an extraordinary mission to the court of Spain ; but from a reluctance to go abroad he declined the appointment.

During the last winter Mr. Dexter was for a few days afflicted with the epidemic prevailing at Washington ; and was once compelled from indisposition to stop in the argument of a cause. He had however entirely recovered, and never seemed in better health. On his return from Washington he went with his family to Athens, in the State of New York, to assist in the celebration of the nuptials of his son. He arrived there on Tuesday the 30th of April, somewhat unwell ; but no serious alarm for his safety existed, until the day previous to his death. Finding his dissolution approaching, he gave the proper directions respecting his affairs, and prepared to meet his fate with the calmness of a

Christian philosopher. He could look back on a life devoted to virtuous pursuits without reproach, and his regrets could only be for his family and his country. About midnight on Friday, the 3d of May, he lost his senses ; and in three hours afterwards he expired in the arms of his family without a struggle or a groan.

Such was the life and such the death of Mr. Dexter. I forbear to give a minute account of the literary honors, which he received, and of the public institutions, of which he was a member. I am aware, how little I am qualified for the office of his biographer ; but I have this consolation, that he needs no other panegyric, than truth. I will close these hasty sketches with a few remarks on his person, character, manners, and acquirements.

In his person, Mr. Dexter was tall and well formed, of strong, well defined features, and bold muscular proportions. His manners were at a first interview reserved and retiring ; and this was sometimes mistaken by a careless observer for austerity or pride. But this impression vanished on a farther acquaintance ; and it was soon perceived, that though he made no effort to court popularity, he was frank, manly, and accessible ; and at the bar conciliatory and respectful. His countenance was uncommonly striking ; and yet perhaps scarcely gave at once the character of his mind. Unless awakened by strong interests his features relaxed into a repose, which betrayed little of his intellectual grandeur. In such situations his eyes had a tranquil mildness, which seemed better suited to an habitual indolence of temperament, than to fervid thoughts. Yet a curious observer might read in his face the traces of a contemplative mind, sometimes lost in reveries and sometimes devoted to the most intense abstractions of metaphysics. When roused into action, his features assumed a new aspect. A steady stream of light emanated from his eyes, the muscles of his face swelled with emotion, and a slight flush chafed his pallid cheeks. His enunciation was remarkably slow, distinct, and musical ; though the intonations of his voice were sometimes too monotonous. His language was plain, but pure



and well selected ; and, though his mind was stored with poetic images, he rarely indulged himself in ornaments of any kind. If a rhetorical illustration, or striking metaphor, sometimes adorned his speeches, they seemed the spontaneous burst of his genius produced without effort, and dismissed without regret. They might indeed be compared to those spots of beautiful verdure, which are scattered here and there in Alpine regions amidst the dazzling whiteness of surrounding snows. In the exordiums of his speeches he was rarely happy. It seemed the first exercise of a mind struggling to break its slumbers, or to control the torrent of its thoughts. As he advanced, he became collected, forcible, and argumentative ; and his perorations were uniformly grand and impressive. They were often felt, when they could not be followed.

Such was the general character of his delivery. But it would be a great mistake to suppose, because his principal favorite was ratiocination, that his delivery was cold, tame, or uninteresting. I am persuaded, that nature had given him uncommon strength of passions. The natural characteristics of his mind were fervor and force ; and, left to the mere workings of his own genius, he would have been impetuous and vehement. But he seemed early to have assumed the mastery of his mind ; to have checked its vivid movements by habitual discipline ; and bound his passions in the adamant chains of logic and reasoning. The dismissal of the graces of fancy and of picturesque description were with him a matter of choice, and not of necessity. He resigned them, as Hercules resigned pleasure, not because he was insensible of its charms, but because he was more enamoured of wisdom. Yet, as if to show his native powers, he has sometimes let loose the enthusiasm of his genius, and touched with a master's hand every chord of the passions, and alternately astonished, delighted, and melted his hearers. Something of the same effect has been produced, by, what may be fitly termed, the moral sublimity of his reasoning. He opened his arguments

in a progressive order, erecting each successive position upon some other, whose solid mass he had already established on an immoveable foundation, till at last the superstructure seemed, by its height and ponderous proportions, to bid defiance to the assaults of human ingenuity. I am aware, that these expressions may be deemed the exaggerations of fancy, but I only describe, what I have felt on my own mind ; and I gather from others, that I have not been singular in my feelings.

It would be invidious to compare Mr. Dexter with other illustrious men of our country, either living or dead. In general acquirements he was unquestionably inferior to many ; and even in professional science he could scarcely be considered, as very profound, or very learned. He had a disinclination to the pages of black-lettered law, which he sometimes censured as the scholastic refinements of monkish ages ; and even for the common branches of technical science, the doctrines of special pleading, and the niceties of feudal tenures, he professed to feel little of love or reverence. His delight was to expatiate in the elements of jurisprudence, and to analyze and combine the great principles of equity and reason, which distinguish the branches of maritime law. In commercial causes, therefore, he shone with peculiar advantage. His comprehensive mind was familiar with all the leading distinctions of this portion of law ; and he marked out with wonderful sagacity and promptitude, the almost evanescent boundaries, which sometimes separate its principles. Indeed it may be truly said of him, that he could walk a narrow isthmus between opposing doctrines, where no man dared to follow him. The law of prize and of nations were also adapted to his faculties ; and no one, who heard him upon these topics, but was compelled to confess, that if he was not always convincing, he was always ingenious ; and that when he attempted to shake a settled rule, though he might be wrong upon authority and practice, he was rarely wrong upon the principles of international justice.

In short, there have been men more thoroughly imbued with all the fine tinctures of classic taste ; men of more playful and cultivated imaginations ; of more deep and accurate research, and of more various and finished learning. But if the capacity to examine a question by the most comprehensive analysis ; to subject all its relations to the test of the most subtle logic ; and to exhibit them in perfect transparency to the minds of others : — If the capacity to detect, with an unerring judgment, the weak points of an argument, and to strip off every veil from sophistry or error : — If the capacity to seize, as it were by intuition, the learning and arguments of others, and instantaneously to fashion them to his own purposes : — If, I say, these constitute some of the highest prerogatives of genius, it will be difficult to find many rivals, or superiors to Mr. Dexter. In the sifting and comparison of evidence, and in moulding its heterogeneous materials into one consistent mass, the bar and the bench have pronounced him almost inimitable.

His eloquence was altogether of an original cast. It had not the magnificent coloring of Burke, or the impetuous flow of Chatham. It moved along in majestic simplicity, like a mighty stream, quickening and fertilizing every thing in its course. He persuaded without seeming to use the arts of persuasion ; and convinced without condescending to solicit conviction. No man was ever more exempt from finesse or cunning in addressing a jury. He disdained the little arts of sophistry or popular appeal. It was in his judgment something more degrading than the sight of Achilles playing with a lady's distaff. It was surrendering the integrity, as well as honor, of the bar. His conduct afforded, in these particulars, an excellent example for young counsellors, which it would be well for them to imitate, even though they should follow in his path with unequal footsteps.

His studies were not altogether of a professional nature. He devoted much time to the evidences and doctrines of Christianity ; and his faith in its truths was fixed after the most elaborate in-

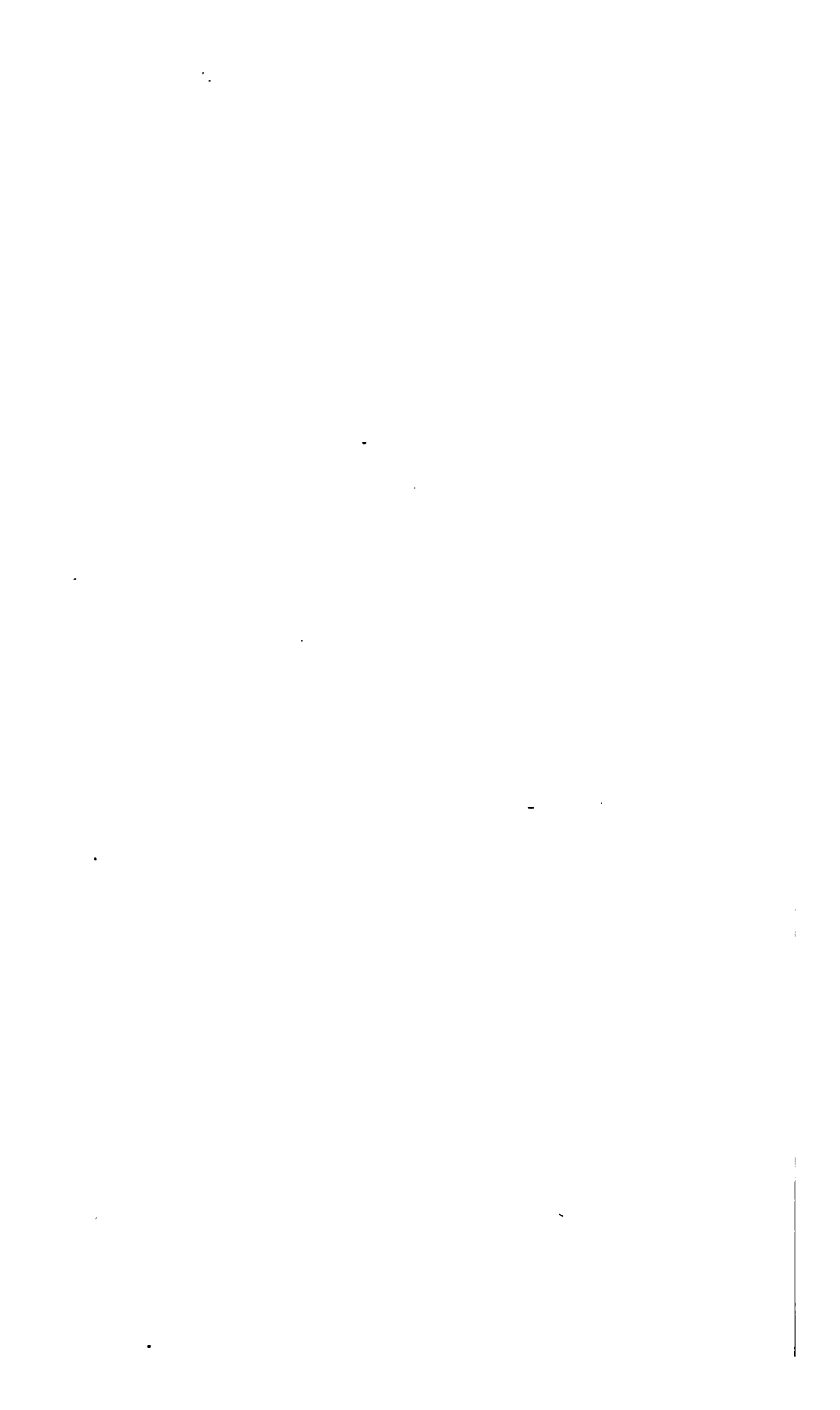
quiries. That he was most catholic and liberal in his views, is known to us all ; but, except to his intimate friends, it is little known, how solicitous he was to sustain the credibility of the Christian system ; and how ingenuous and able were his expositions of its doctrines.

As a statesman, it is impossible to regard his enlightened policy and principles without reverence. He had no foreign partialities or prejudices to indulge, or gratify. All his affections centred in his country ; all his wishes were for its glory, independence, and prosperity. The steady friend of the constitution of the United States, he was, in the purest and most appropriate sense of the terms, a patriot and a republican. He considered the union of the States as the polestar of our liberties ; and whatever might be his opinion of any measures, he never breathed a doubt to shake public or private confidence in the excellence of the constitution itself. When others sunk into despondency at the gloomy aspect of public affairs, and seemed almost ready to resign their belief in republican institutions, he remained their inflexible advocate. He was neither dismayed by the intemperance of parties, nor by the indiscretion of rulers. He believed in the redeeming power of a free constitution ; and that, though the people might sometimes be deceived, to their intelligence and virtue we might safely trust to equalize all the eccentricities and perturbations of the political system. He had the singular fortune, at different times, to be the favorite of different parties, occupying in each the same elevation. It is not my purpose to examine, or vindicate his conduct in either of these situations. I feel indeed, that I am already treading upon ashes thinly strewn over living embers. The present is not the time for an impartial estimate of his political conduct. That duty belongs, and may be safely left to posterity. Without pretending to anticipate their award, we may with some confidence affirm, that the fame of Mr. Dexter has little to fear from the most rigid

scrutiny. While he lived, he might be claimed with pride by any party ; but now that he is dead, he belongs to his country.

To conclude, — Mr. Dexter was a man of such rare endowments, that in whatever age or nation he had lived, he would have been in the first rank of professional eminence. It is unfortunate, that he has left no written record of himself. The only monument of his fame rests in the frail recollections of memory, and can reach future ages only through the indistinctness of tradition or history. His glowing thoughts, his brilliant periods, and his profound reasonings, have perished for ever. They have passed away like a dream or a shadow. He is gathered to his fathers ; and his lips are closed in the silence of death.

I rejoice to have lived in the same age with him ; and to have been permitted to hear his eloquence, and to be instructed by his wisdom. I mourn, that my country has lost a patriot without fear or reproach. The glory, that has settled on his tomb will not be easily obscured ; and if it shall grow dim in the lapse of time, I trust, that some faithful historian will preserve the character of his mind in pages, that can perish only with the language, in which it is written.



# A TABLE

## OF THE PRINCIPAL MATTERS.

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### ABANDONMENT.

1. If a seizure be abandoned, no jurisdiction attaches to any court unless there be a new seizure. But to constitute such abandonment, there must be an unequivocal act of dereliction. If after a seizure of a ship, the master agrees to navigate her into port under the direction of the seisor, and then to give her again into the possession of the seisor, this is no abandonment, although in consequence of such agreement the seisor's crew are withdrawn from the ship. *The Abby*. 360.

### ACTION.

1. In an action for damages for negligence in keeping the plaintiff's sheep, founded on the breach of a special contract, the defendant will not be permitted to deduct from the damages the compensation which he claims for keeping the sheep. Such compensation, if any be due, must be sought in a distinct action.

*Crowninshield v. Robinson*. 93

2. Debt lies in favor of a holder of a dishonored bank note, against a stockholder in the bank, to recover the amount of the note, under the provisions of the bank charter making stockholders personally liable for such note in such a case.

*Bullard v. Bell*. 243

3. The statute of limitations of *New Hampshire* (which is in this respect a transcript of the statute of 21 Jac. 1. ch. 16,) does not apply as a bar to an action of debt upon the provision of the statute mak-

ing the stockholders liable to the holder of bills; for it is not founded on any contract or lending without specialty.

*Ibid.* 243

4. *Semble* that debt lies in all cases, where a sum certain is due to the party, although it arise from a collateral undertaking.

*Ibid.*

5. A bank note payable to W. Pitt or bearer is in effect payable to the bearer; and, as between any *bond fide* holder and the bank, such holder is to be deemed the bearer, to whom the bank is originally liable. *A fortiori* the holder may maintain a suit against a stockholder upon default of payment of such note.

*Ibid.*

6. If a draft not negotiable, be accepted by the drawee, with an agreement to pay the amount to any person to whom it is assigned; the assignee after notice may maintain an action for money had and received to his use against the acceptor.

*Weston v. Penniman*. 306

7. Replevin does not lie unless there has been an unlawful taking from the possession of another. If after a bailment of goods they are unlawfully converted or detained, detinue or trover and not replevin is the proper remedy.

*Meany v. Head*. 319

8. In an action for goods sold the defendant may give in evidence, in mitigation of damages, that the goods were of a quality inferior to what they were represented to be at the sale.

*Miller v. Smith*. 437

9. If a factor pledge the goods of his principal for his own debts, the principal may, after a demand and refusal, maintain trover for them against the pawnee.

*Van Amringe v. Peabody.* 440

10. Debt lies in favor of the United States against the importer, for the duties due on goods imported.

*United States v. Lyman.* 482

11. Debt lies against the importer, for the duties on smuggled goods. So where by mistake, accident, or fraud, no bond is given to secure them. So where short duties only have been paid.

*Ibid.*

12. An information of debt, or an information in the nature of a bill of discovery and account, is a proper remedy for the United States for the duties where goods have been smuggled, or where by mistake, accident, or fraud, no bond has been given, or where short duties only have been paid.

*Ibid.*

#### ADMIRALTY.

1. The District Court, as a Court of Admiralty and maritime jurisdiction, may entertain suits for all torts, damages, and unlawful seizures at sea.

*Burke v. Trevitt.* 96

See JURISDICTION.

2. The Admiralty has jurisdiction in *personam*, as well as in *rem*, for pilotage earned in piloting ships to, from, and on, the sea.

*The Anne.* 508

#### ADVANCES.

1. A factor has, by the general law, the personal security of the owner, as well as a lien on the goods for his advances; but by contract he may waive the right to a personal responsibility.

*Peisch v. Dickson.* 9

2. If a consignee of goods agree that for advances made "he will hold for reimbursement on the amount and net proceeds of said goods, which are only considered answerable for said amount ad-

vanced," it is a waiver of any personal claim against the owner for reimbursement. *Ibid.* 10

3. By a policy on a vessel and cargo, a party having a lien for advances, or a special ownership and possession, may prove his interest in the vessel and cargo, to the extent of his advances and lien. *Seamans v. Loring.* 128

4. Where money is advanced to a partnership under a guaranty, and the partnership is dissolved, and the debt is then carried at the request of the debtors to their separate accounts, according to their proportion of interest in the partnership, and the creditor gives the partners separately, a credit for such proportion, and discharges the partnership account by carrying it to such separate account, and no notice is given thereof to the guarantor, the latter is discharged from all responsibility.

*Cremer v. Higginson.* 324

5. If upon a letter of guaranty addressed to a particular person, advances are made upon the faith of the guaranty, it is the duty of the person so making the advances, to give notice thereof within a reasonable time to the guarantor, otherwise he will be discharged from all liability for such advances. *Ibid.* 324

#### AGREEMENT.

1. Prize money must be distributed according to some written agreement of the parties; otherwise it is distributable according to the 4th section of the Prize Act of the 20th of June, 1812, ch. 107. *The Dash.* 4

2. A parol agreement as to distribution is void. *Ibid.*

#### ALIEN.

See TITLE.

#### AMBIGUITIES.

What constitute latent and patent ambiguities, and when parol evidence is admissible to explain them. *Peisch v. Dickson.* 9



**APPEAL.**

1. If a final decree of the District Court be not appealed from, no appeal lies upon any subsequent proceedings, upon the summary judgment rendered on a bond for the appraised value, or upon an admiralty stipulation taken in the cause to enforce the decree. The proceedings in such cases, and the awarding of execution are incidents exclusively belonging to the Court in possession of the principal cause. *The Brig Hollen.* 431

**ARMY.**

See MINORS.

**ASSIGNEE.**

See ACTION, 6.

BILLS OF EXCHANGE, 9.

**ASSIGNMENT.**

1. A parol assignment of a share in prizes is void. *The Dash.* 4

**BILL OF EXCEPTIONS.**

1. It is no ground for a bill of exceptions that a court refused to instruct the jury on a point of law, which was so stated that it involved an opinion on matters of fact, as when an opinion was prayed "under the circumstances of the case," which were not found as facts.

*United States v. Burnham.* 57

**BILLS OF EXCHANGE.****PROMISSORY NOTES, &c.**

1. When upon a bill payable at so many days *after sight* the holder presents the bill for acceptance, and elects to consider what passes on such presentment, as a non-acceptance, he is bound by such election as to all the other parties in the bill, and must give due notice to them of the dishonor accordingly; otherwise they will be discharged. And a subsequent acceptance by the drawee on the next day will not be sufficient to charge the drawer, in case no such notice is given, and the

drawee fails before the day of payment. *Mitchell v. Degrand.* 176

2. A bill drawn payable at five days *after sight*, and accepted on the *first* day of a month, is payable on the *ninth* of the same month, the day of the acceptance being excluded, and the three days of grace allowed; a demand on the eighth and protest for non-payment on that day, is too early, and therefore void. *Ibid.*

3. A bill payable at five days after sight is presented for acceptance on the 30th of September, but not in fact accepted until the 1st of October, the acceptance takes effect only from that day, and does not relate back to the time of presentment on the preceding day. *Ibid.*

4. A bill payable at so many days after sight, means so many days after legal sight, that is, so many days after the acceptance, for that is the sight, to which the bill refers. *Ibid.*

5. If the vendor of land take a negotiable note of the vendee *endorsed* by a *third person* payable at future times by instalments, this is such a distinct security as extinguishes the lien upon the land for the purchase money.

*Gilman v. Brown.* 192

6. Upon a bank note payable to W. Pitt or bearer, the Circuit Court has jurisdiction to enforce payment in favor of a holder who is a citizen of another State, although it is not shown that W. Pitt is a fictitious person, or a citizen of another State; the prohibition of the Act of the 24th September, 1789, ch. 20, § 11, not applying to such a note.

*Bullard v. Bell.* 243

7. Debt lies in favor of a holder of a dishonored bank note, against a stockholder in the bank, to recover the amount of the note under the provisions of the bank charter making the stockholders personally liable for such note in such a case. *Ibid.*

8. A bank note payable to W: Pitt or bearer, is in effect payable to the bearer; as between any *bond fide* holder, and the bank, such holder is to be deemed the bearer, to whom the bank is originally liable. *Ibid.*

9. If a draft, not negotiable, be accepted by the drawee with an agreement to pay the amount to any person to whom it is assigned; the assignee after notice may maintain an action for money had and received to his use against the acceptor.

*Weston v. Penniman.* 306

#### BOND.

1. In proceedings *in rem* upon a bond for the appraised value given jointly and severally, if one of the obligors dies, the Court will proceed against the survivor, or, at the option of the plaintiffs, against the representatives of the deceased also. *The Octavia.* 149

#### CAPTOR.

1. Where the captors have been guilty of irregularity in not bringing in the papers, or the master of the captured ship, farther proof will be ordered.

*London Packet.* 14

2. Captors are bound to good faith and ordinary diligence, and are therefore liable for ordinary negligence.

*The George.* 24

#### CAPTURE.

1. Probable cause is a sufficient justification for a capture. But such protection may be forfeited by subsequent misconduct or negligence. What constitutes probable cause. *The George.* 24

2. To constitute probable cause for capture, it is not necessary that there should be *prima facie* evidence to condemn. It is sufficient if there be circumstances, which warrant a reasonable suspicion of illegal conduct.

3. Where a vessel has been captured on her voyage, and con-

demned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored.

*Sampayo v. Salter.* 43

4. Of the effect of capture upon the contract for mariners' wages.

*Emerson v. Howland.* 45

#### CIRCUIT COURT.

1. Upon a judgment rendered on proceedings under the 10th section of the Patent Act of 21st of February, 1793, ch. 11, in the nature of a *scire facias* at common law to repeal a patent, error lies to the Circuit Court.

*Stearns v. Barrett.* 153

2. Upon a bank note, payable to W. Pitt or bearer, the Circuit Court has jurisdiction to enforce payment, in favor of a holder who is a citizen of another State, although it is not shown that W. Pitt is a fictitious person, or a citizen of another State; the prohibition of the Act of 24th September, 1789, ch. 20, § 11, not applying to such a note.

*Bullard v. Bell.* 243

3. The Circuit Court has no jurisdiction in causes of admiralty and maritime jurisdiction, except over the *final* decrees of the District Court. *The Brig Hollen.* 431

#### CLAIM.

1. The consul of a nation may claim on behalf of its subjects in the absence of any authorized agent. *The London Packet.* 14

2. In general the prize court will not trust a claimant with an order for farther proof, who has shown himself capable of abusing it. *The San Jose Indiano.* 38

3. If a claim be interposed by the United States in a prize proceeding upon a seizure for a forfeiture under the non-importation acts, and the title of the captors and the claimants be defeated; the property will be condemned to the United States, subject to distribution according to

the provisions of the Act of 2d of March, 1799, ch. 128, § 91.

*The Brig Gefla.* 88

4. If a party in a case of seizure files a claim and plea to the merits, on which the parties are at issue, it is a waiver of any exception to the jurisdiction. On such claim and plea no question as to the place of seizure is before the Court. *The Abby.* 360

## COLLECTOR.

See INFORMATION.

## COLLECTION ACT.

See INFORMATION.

See CONCEALMENT, 1.

## COMMON LAW.

1. The ship registry Acts have not changed the common law, as to the mode in which ships may be transferred; but only take from any ship not transferred according to those acts, the character of an American ship.

*Weston v. Peckman.* 306

## CONCEALMENT.

1. What constitutes a concealment of goods within the 69th section of the Collection Act of 2d of March, 1799, ch. 128.

*United States v. Furnsworth.* 1

2. If an officer of the customs seizes goods, a party, who resists the seizure is not guilty of concealment within the Statute, merely by such act of resistance; although the goods are taken away, and wholly removed from the custody of the officer in consequence thereof. *Ibid.*

## COMPENSATION.

See DAMAGES, 2.

## CONDEMNATION.

1. Circumstances leading to condemnation.

*The London Packet.* 14

*The San Jose Indiano.* 38

2. Where a vessel has been captured on her voyage, and condemned at an intermediate port,

and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored.

*Sampayo v. Salter.* 43

3. If a claim be interposed by the United States in a prize proceeding upon a seizure for a forfeiture under the non-importation Acts, and the title of the captors and the claimants be defeated, the property will be condemned to the United States, subject to distribution according to the provisions of the Act of 2d March, 1798, ch. 128, § 91.

*The Brig Gefla.* 88

4. After a final decree of condemnation unappealed from, in a case of seizure by a collector for a breach of the revenue laws, the Secretary of the Treasury has no authority to remit the collector's share of the forfeiture. It is a vested and absolute right.

*The Brig Hollen.* 431

## CONGRESS.

See PARENT.

## CONSIGNEE.

See DAMAGES, 3.

See SHIPMENT.

## CONTRACT.

1. Where a sale is made of goods, and they are delivered, and an agreement is afterwards made to rescind the contract, the contract is not completely rescinded until a redelivery of the goods.

*Miller v. Smith.* 437

See SHIPPING.

FACTOR.

CAPTURE, 4.

ACTION, 1, 3.

## CONTRIBUTION.

1. When an embezzlement takes place on board of a ship the seamen are not liable to contribute out of their wages, unless it was caused by their fraud, connivance, or negligence; or if the offender is unknown, unless a presumption of guilt is fixed upon all the crew,

or at least on those who are called upon to contribute.

*Spurr v. Pearson.* 104

#### COSTS.

1. When allowed in prize causes. *The Ulpiano.* 91

#### CREW.

See SEAMEN.

#### CRUISE.

See PRIZE.

#### CUSTODY.

See OFFICER.

#### DAMAGES.

1. Damages decreed for the amount of goods taken out of a prize captured after the treaty of peace of 1811. *The Ulpiano.* 91

2. In an action for damages for negligence in keeping the plaintiff's sheep, founded on the breach of a special contract, the defendant will not be permitted to deduct from the damages the compensation which he claims for keeping the sheep. Such compensation, if any be due, must be sought in a distinct action.

*Crowninshield v. Robinson.* 93

3. In assumpsit against a consignee or bailiff of goods, "to sell the same and render a reasonable account," damages for not remitting when exchange was favorable, are not allowable.

*Pope v. Barrett.* 117

4. If a person has in the acts of Court asserted himself as part owner of a privateer, he will be responsible as such owner for damages assessed against such privateer, although his name be not in the ship's papers.

*The Mary.* 365

5. In an action for goods sold, the defendant may give in evidence, in mitigation of the damages, that the goods were of a quality inferior to what they were represented to be at the sale.

*Miller v. Smith.* 437

#### DEBT.

1. Debt lies in favor of a holder of a dishonored bank note, against a stockholder in the bank, to recover the amount of the note under the provisions of the bank charter making the stockholders personally liable for such note in such a case. *Bullard v. Bell.* 243

2. *Semble* that debt lies in all cases where a sum certain is due to the party, although it arise from a collateral undertaking. *Ibid.*

3. A bank note payable to W. Pitt or bearer, is in effect payable to the bearer, and as between any *bonâ fide* holder and the bank, such holder is to be deemed the bearer, to whom the bank is originally liable. *A fortiori*, the holder may maintain a suit against a stockholder upon default of payment of such note under the provisions of the bank charter making the stockholders personally liable in such case. *Ibid.*

4. The statute of limitations of New Hampshire, (which is in this respect a transcript of the statute 21 Jac. 1. ch. 16.) does not apply as a bar to an action of debt brought upon a bank note under the provisions of the bank charter making the stockholders personally liable for such note, for the action is not founded upon any contract or lending without speciality. *Ibid.*

5. Debt lies in favor of the United States against the importer for the duties due on goods imported.

*United States v. Lyman.* 482

6. The right to duties accrues by the importation with an intent to unlade, and immediately upon the importation the duties become a personal charge and debt on the importer. *Ibid.*

7. A bond taken at the Custom-House to secure the duties due by the importer of goods, is not an extinguishment of the debt so accruing, but merely collateral security for its payment. *Ibid.*

8. Debt lies against the importer for the duties on smuggled goods. So where by mistake, accident, or fraud, no bond is given to secure them. So where short duties only have been paid. *Ibid.*

9. An information of debt or an information in the nature of a bill of discovery and account, is a proper remedy for the United States in such cases. *Ibid.*

10. In what cases the taking of a higher security operates as an extinguishment of a debt, and in what cases not. Where such security is given by the debtor, *prima facie* the law presumes it intended as an extinguishment of the debt. *Aliter*, where it is the bond of a third person. *Ibid.*

11. It seems that a debt accruing by a Statute though a specialty, is not of so high a dignity as a bond. *Ibid.*

#### DECREE.

See CIRCUIT COURT, 2.

APPEAL, 1.

CONDEMNATION, 1.

#### DEVISE.

1. Devise by testator to his wife for life, and after her decease to his two daughters, A and B, *to them, their heirs and assigns; but in case they should die without issue*, that the same should go to and vest in their two sisters, C and D. Held, that the devise to A and B, was a *fee tail*, and not a *fee simple*, the contingency upon which the limitation was to take effect, not being limited to a life in being, but being upon an indefinite failure of issue; and that the estate to C and D, was a vested remainder, to take effect upon the death of both A and B, without issue. That cross remainders in tail were to be implied between A and B. That at common law, A and B would take joint estates for life, with several remainders in tail to their issue; but by the Statute of Rhode Island, it would be turned into a tenancy in com-

mon, and several estates tail in possession vested in them.

*Lillibridge v. Adie.* 224

#### DISCHARGE.

See SEAMEN, 2.

#### DISTRICT.

1. When a seizure is made within the limits of a judicial district, the District Court of that district has exclusive original cognizance thereof. And if brought into another district, the Court will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any District Court into which the property is brought.

*The Abby.* 360

2. In an information on the 50th section of the Collection Act of 1799, ch. 128, it is necessary to allege that the goods were unladen in some port or place within the collection district, without a permit from the collector of that port or district.

*United States v. Burnham.* 57

#### DISTRICT COURT.

1. The District Court, as a Court of Admiralty and maritime jurisdiction, may entertain suits for all torts, damages, and unlawful seizures at sea; and as a court of revenue, it may entertain suits for the trial of property seized for violation of municipal laws; and, as incident to this jurisdiction, may compel a redelivery of the property, and award damages for any loss of, or injury to, it. It may compel a seisor to proceed to adjudication, in the same manner as it does a captor. After process served in proceedings *in rem*, the thing is deemed in the custody of the Court, though in the actual possession of the collector, under the Act of 1799.

*Burke v. Trevitt.* 96

2. When a seizure is made within the limits of a judicial district, the District Court of that district has exclusive original cognizance

thereof. And if brought into another district the Court will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any District Court into which the property is brought.

*The Abby.* 360

### DOMICILE.

1. A Court of Equity has jurisdiction to decree an account and distribution, according to the *lex domicilii*, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted to be distributed by a foreign tribunal, depends upon the circumstances of the case.

*Harvey v. Richards.* 381

### DUTIES.

1. Debt lies in favor of the United States against the importer for the duties due on goods imported.

*United States v. Lyman.* 482

2. The right to duties accrues by the importation with an intent to unlade; and immediately upon the importation the duties become a personal charge and debt on the importer.

*Ibid.*

3. The collector has no authority to receive the bond of any person as security for the payment of duties, except such person be legally entitled to enter them.

*Ibid.*

See DEBT, 5, 6, 7, 8.

### EMBEZZLEMENT.

See SEAMEN, 3.

### ERROR.

See PLEADING, 1.

### EVIDENCE.

1. Where parol evidence is admissible to explain latent and patent ambiguities.

*Peisch v. Dickinson.* 9.

2. Where the captors have been guilty of irregularity in not bringing in the papers, or the master of the captured ship, farther proof will be ordered.

*London Packet.* 14

3. Where property is shipped in an enemy's vessel, the presumption of its being enemies' property, can only be repelled by strong and clear proofs of a neutral interest.

*Ibid.*

4. After an appeal the Court may allow evidence, not received in season to be made a part of the case, to be put upon the record *de bene esse*, with a memorandum of the fact.

*Ibid.*

5. To constitute probable cause for capture, it is not necessary that there should be *prima facie* evidence to condemn. It is sufficient if there be circumstances, which warrant a reasonable suspicion of illegal conduct.

*The George.* 24

6. One seamen may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the event of the suit.

*Spurr v. Pearson.* 104

7. On an indictment upon the Act of 16th March, 1802, ch. 9, § 19, for purchasing of a soldier "his arms," it must be proved, that the soldier was in the lawful possession of the arms, or had a special bailment of them, otherwise the indictment cannot be sustained.

*United States v. Brown.* 151

8. Upon a trial under the general issue, under the 10th section of the Patent Act, the burthen of proof, that the patent was obtained surreptitiously or upon false suggestion, lies on the plaintiff.

*Sleams v. Barrett.* 153

9. In an action for goods sold, the defendant may give in evidence, in mitigation of the damages, that the goods were of a quality inferior to what they were represented to be at the sale.

*Miller v. Smith.* 437

10. On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the Act of the 30th of April 1790, ch. 9, it is not necessary to prove, that it was committed on the high seas.

*United States v. Hamilton.* 443.

11. Upon a hearing on an issue on a plea in bar to a bill in chancery, the defendant's answer in support of his plea is good evidence; and unless disproved by two witnesses, or by one witness and very strong circumstances, it must prevail in his favor.

*Hughes v. Blake.* 515

### EXTINGUISHMENT.

1. If the vendor of land take a negotiable note of the vendee, indorsed by a third person, payable at future times by instalments, this is such a distinct security as extinguishes the lien on the land for the purchase money.

*Gilman v. Brown.* 192

2. Where the indorsed notes of A became due, and were taken up at the banks, and new notes signed by A, and B his partner, and indorsed, were received by the banks in their stead; it was held, that by such substitution the old notes were extinguished.

*Russell v. Perkins.* 368

3. A bond taken at the Custom House to secure the duties due by the importer of goods is not an extinguishment of the debt so accruing, but merely collateral security for its payment.

*United States v. Lyman.* 482

4. In what cases the taking of a higher security operates as an extinguishment of a debt, and in what cases not. *Ibid.*

5. Where a higher security is given by the debtor, *prima facie* the law presumes it intended as an extinguishment of the debt. *Aliter*, where it is the bond of a third person. *Ibid.*

### FACTOR.

1. A factor has, by the general

law, the personal security of the owner, as well as a lien on the goods, for his advances; but by contract he may waive the right to a personal responsibility.

*Peisch v. Dickson.* 9

2. A factor cannot pledge the goods of his principal for his own debts; and if he does, the principal may, after a demand and refusal, maintain trover for them against the pawnee.

*Van Amringe v. Peabody.* 440

### FARTHER PROOF.

1. Where the captors have been guilty of irregularity, in not bringing in the papers, or the master of the captured ship, farther proof will be ordered.

*The London Packet.* 14

2. In general the prize court will not trust a claimant with an order for farther proof, who has shown himself capable of abusing it. *The San Jose Indiano.* 38

3. Defects of the case on farther proof, inflame suspicions. *Ibid.*

### FREIGHT.

1. Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored.

*Sampayo v. Salter.* 43

### GUARANTY.

1. Upon a letter containing this clause: "The object of the present letter is to request you, if convenient, to furnish them (the persons on whose account the letter was given, who were partners) with any sum they may want, as far as fifty thousand dollars; say fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves an-

swerable to you for the amount." Held, that this was not an absolute original undertaking, but a guaranty; that it covered advances only to the persons on whose account it was given whilst partners, and on partnership account, and could not be applied to cover advances to either of the partners separately, on his separate account; that the authority of the guaranty was revoked by a dissolution of the partnership, and no subsequent advances made by the party after a full notice of such dissolution were within the reach of the guaranty; that the letter did not import to be a continuing guaranty for money advanced *toties quoties* from time to time, to the amount of fifty thousand dollars, but for a single advance of money to that amount; and that when advances were made to fifty thousand dollars, no subsequent advances were within the guaranty; although at the time of such farther advances, the sum actually advanced had been reduced below fifty thousand dollars, by reimbursements of the debtors.

*Cremier v. Higginson.* 323

2. When money is advanced to a partnership under a guaranty and the partnership is dissolved, and the debt is then carried at the request of the debtors to their separate accounts, according to their proportion of interest in the partnership; and the creditor gives the partners separately a credit for such proportion and discharges the partnership account by carrying it to such separate account, and no notice is given thereof to the guarantor, the latter is discharged from all responsibility. *Ibid.*

3. If upon a letter of guaranty addressed to a particular person, advances are made upon the faith of the guaranty, it is the duty of the person so making the advances, to give notice thereof within a reasonable time to the

guarantor, otherwise he will be discharged from all liability for such advances. *Ibid.*

4. A guaranty of the notes of A cannot be applied as a guaranty of the notes of A and B.

*Russell v. Perkins.* 363

5. Upon a guaranty to the plaintiff of all notes of A, which he should endorse, to the amount of \$10,000, the plaintiff endorsed notes of A, to the stipulated amount at several banks; and when the notes became due, they were taken up at the banks, and new notes, signed by A, and B his partner, and endorsed, were received by the banks in their stead. It was held, that the guaranty did not apply to the new notes; and that by such substituting the old notes were extinguished. *Ibid.*

6. Of the effect of laches in giving notice under a guaranty. *Ibid.*

#### HIGH SEAS.

1. A vessel lying on the sea, outside of the bar of a harbour of the United States, within three miles of the shore, is on the high seas.

*United States v. Smith.* 147

2. The cognizance of seizures on the high seas belongs to any District Court, into which the property is brought.

*The Sloop Abby.* 360

3. On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the Act of the 30th of April, 1790, ch. 9, it is not necessary to prove, that it was committed on the high seas.

*United States v. Hamilton.* 443

#### INDICTMENT.

1. On an indictment upon the Act of 16th of March, 1802, ch. 9, § 19, for purchasing of a soldier "his arms," it must be proved, that the soldier was in the lawful possession of the arms, or had a special bailment of them,



otherwise the indictment cannot be sustained.

*United States v. Brown.* 151

2. On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the Act of the 30th of April, 1790, ch. 9, it is not necessary to prove, that it was committed on the high seas.

*United States v. Hamilton.* 443

### INFORMATION.

1. In an information on the 50th section of the Collection Act of 1799, ch. 128, it is necessary to allege, that the goods were unladen in some port or place within a collection district, without a permit from the collector of that port or district. But it will be sufficient, if the fact be so, to allege the port or district to be to the attorney unknown.

*United States v. Burnham.* 57

2. An information of debt, or an information in the nature of a bill of discovery and account, is a proper remedy for the United States, against the importer for the duties on smuggled goods. Or where no bond has been given to seize them through mistake, accident, or fraud. Or where short duties only have been paid.

*United States v. Lyman.* 482

### INSURANCE.

1. In a policy at and from a port, the construction of it, as to the time when the policy attaches, depends on circumstances. If the vessel be in a foreign port, in the course of a voyage, it attaches from her first arrival there. If in a domestic port, then from the date of the policy. If the vessel has been long lying in port, without reference to any particular voyage, then it attaches from the time preparations are begun to be made for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until after his ownership commences.

*Seamans v. Loring.* 128

2. If a policy be for A B, or whom it may concern, and made by an agent without any warranty or representation of national character, it will cover the interest of any person, whether an American or foreigner, who has authorized the insurance.

*Ibid.*

3. By a policy on a vessel and cargo, a party having a lien for advances, or a special ownership and possession, may protect his interest in the vessel and cargo, to the extent of his advances and lien.

*Ibid.*

4. By the usual clause in policies, as to prior insurances, the underwriter is exonerated, if prior insurances to the full value of the vessel and cargo, have been actually made by the assured on the same voyage, and in full force at the time, although by a subsequent agreement, between the assured and such prior underwriters, before the risk is commenced, the prior policies are cancelled.

*Ibid.*

5. It seems that if a vessel be described in the policy to be a prize vessel, and afterwards her national character be changed, so as to increase the risk, this discharges the underwriters.

*Seamans v. Loring.* 128

6. If in a policy "at and from," the insured unreasonably delay to commence the risk, or the voyage, the underwriter is discharged. It amounts to a non-inception of the voyage insured.

*Ibid.*

7. Where a vessel was stranded, and afterwards, before abandonment, was gotten off without material injury, but was, in the intermediate time, sold by the master at public auction, and purchased by him; it was held, that the plaintiff was not entitled to recover for a total loss.

*Church v. Marine Insurance*

*Company.* 341

### INTEREST.

See EVIDENCE, 6.

INSURANCE, 2, 3.

## ISSUE.

See DEVISE, 1.

## JURISDICTION.

1. The District Court, as a court of admiralty and maritime jurisdiction, may entertain suits for all torts, damages, and unlawful seizures at sea; and as a court of revenue, it may entertain suits for the trial of property seized for violations of municipal laws, and, as incident to this jurisdiction, may compel a redelivery of the property, and award damages for any loss of, or injury to it. It may compel a seisor to proceed to adjudication, in the same manner as it does a captor.

*Burke v. Trevitt.* 96

2. The award of commissioners appointed under the Acts of Congress of the 31st of March, 1814, ch. 98, and of the 23d of January, 1815, ch. 706, and of the 3d of March, 1815, ch. 778, appointed to settle the claims of the New-England Mississippi Land Company and others to the Yazoo lands (so called) is not conclusive, as between the scrip-holders and the said company, as to their rights deprived under the grants of certificates of shares in the stock of the company itself. The commissioners had no jurisdiction of any such question.

*Gilman v. Brown.* 191

3. Upon a bank note payable to W. Pitt or bearer, the Circuit Court has jurisdiction to enforce payment, in favor of a holder who is a citizen of another State although it is not shown, that W. Pitt is a fictitious person, or a citizen of another State; the prohibition of the Act of the 24th September, 1789, ch. 20, § 11, not applying to such a note.

*Bullard v. Bell.* 243

4. When a seizure is made within the limits of a judicial district, the District Court of that district has exclusive original cognizance thereof. And if brought into another district, the Court

will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any District Court, into which the property is brought.

*The Abby.* 360

5. If a seizure be abandoned, no jurisdiction attaches to any court unless there be a new seizure. But to constitute such an abandonment, there must be an unequivocal act of dereliction.

*Ibid.*

6. A party who means to except to the jurisdiction of the court must plead to that jurisdiction. If he files a claim and plea to the merits, on which the parties are at issue, it is a waiver of any exception to the jurisdiction.

*Ibid.*

7. A Court of Equity has jurisdiction to decree an account and distribution, according to the *lex domicilii* of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here.

*Harvey v. Richards.* 381

8. The Circuit Court has no jurisdiction in causes of admiralty and maritime jurisdiction except over the *final* decrees of the District Court.

*The Brig Hollen.* 431

9. The admiralty has jurisdiction in *personam* as well as *in rem*, for pilotage earned in piloting ships to, from, or on, the sea.

*The Anne.* 508

10. The Circuit Court has no jurisdiction of suits between citizens of different States, except where one of the parties is a citizen of the State where the suit is brought.

*White v. Fenner.* 521

## LARCENY.

1. Larceny committed on board an American ship, in an inclosed dock in a foreign port, is not punishable under the Statute of 30th of April, 1790, ch. 9, § 16.

*United States v. Hamilton.* 152

**LIEN.**

1. a factor has, by the general law, the personal security of the owner, as well as a lien on the goods, for his advances; but by contract he may waive the right to a personal responsibility.

*Peisch v. Dickson.* 9

2. By a policy on a vessel and cargo, a party having a lien for advances, or a special ownership and possession, may protect his interest in the vessel and cargo, to the extent of his advances and lien. *Seamans v. Loring.* 128

3. The origin and nature of liens on land for unpaid purchase money.

*Gilman v. Brown.* 192

4. Generally speaking, a lien on land for the unpaid purchase money exists, as between vendor and vendee, and also as against subsequent purchasers from the vendee with notice, that the money remains unpaid; but not as against a purchaser *bond fide* without notice. But the rule itself is not inflexible, as between vendor and vendee. And therefore if the parties do any unequivocal act, by which they clearly show, that they do not contemplate such a lien to exist, the lien is not permitted to attach. If the vendor take a distinct security for the money, either of property or of the responsibility of a third person, the lien is waived. But merely taking the note or bond of the vendee himself, without a surety, is no waiver of the lien. If the vendor take a negotiable note of the vendee, endorsed by a third person, payable at future times by instalments, this is such a distinct security as extinguishes the lien. *Ibid.*

*Quere*, whether on a purchase of lands, lying in another State, made under a contract executed in Massachusetts by citizens of that State, a lien for the purchase money vests in favor of the vendors, who are citizens of the State where the lands lie, the contract

being silent on that head, and no such lien existing by law in any case of the purchase of land in Massachusetts. *Ibid.*

5. A lien is always supposed to exist by the tacit consent of all the parties. Can such consent be presumed, where the law of the State is not known to the purchasers in another State. *Ibid.*

6. A lien is neither a *jus ad rem*, nor a *jus in re*; and the lien of a vendor on the land sold is so mere a creature of the Court of Equity that its existence cannot be safely predicated in any case, until established by the decree of the court. *Ibid.*

7. A lien is neither a *jus ad rem*, nor a *jus in re*, but a simple right of retainer. It is therefore not attachable as personal property, or as a chose in action of the person, who is entitled to it.

*Meany v. Head.* 319

8. To make pilotage a lien on the ship, the contract must have been made by some person in the employment of the owner, duly authorized to make the contract, such as the master, or the quasi master. But mere wrongdoers, or mutineers, have no authority to bind the ship. *The Anne.* 508

**LIBEL.**

1. On a libel for mariners' wages, the Court will enforce the payment of the three months' wages, required by the Act of Congress of the 28th of February, 1803, ch. 62, where seamen are discharged abroad without the payment of them.

*Emerson v. Howland.* 45

2. A libel for a Statute forfeiture should substantially agree with the terms of the Statute, otherwise it is bad.

*The Schooner Betsy.* 354

3. In a libel on the 50th section of the Revenue Act of the 2d of March, 1799, ch. 128, it is not necessary to allege the goods to be of foreign growth or manufacture. *Ibid.*

**MASTER.**

See **SHIPPING ARTICLES**, 4.

**MINORS.**

1. Congress have a constitutional right to enlist minors, in the navy or army, without the consent of their parents.

*United States v. Bainbridge.* 71

2. Under the Navy Acts, the consent of the father is not necessary to the valid enlistment of boys in the service. *Ibid.*

**MUTINY.**

See **SEAMEN**, 5.

**NAVY.**

1. Under the Navy Acts, the consent of the father is not necessary to the valid enlistment of boys in the service.

*United States v. Bainbridge.* 71

2. Congress have a constitutional power to enlist minors, in the navy or army, without the consent of their parents. *Ibid.*

**NEGLIGENCE.**

See **PROBABLE CAUSE**, 1, 4.  
**SEAMEN**, 3.

**NOTICE.**

See **GUARANTY**, 1, 2, 3, 6.

**OBLIGOR.**

1. In proceedings *in rem*, upon a bond for the appraised value given jointly and severally, if one of the obligors dies, the court will proceed against the survivor, or at the option of the plaintiffs, against the representative of the deceased also. *The Oclavia.* 149

**OFFICER.**

1. The officers of the Court who have the custody of property seized, pending the suit, are responsible for any loss or injury sustained by want of due diligence.

*Burke v. Trevitt.* 96

2. If an officer of the revenue seize goods without probable cause, he is responsible for all losses and injuries however occa-

sioned. If with probable cause he is responsible only for losses and injuries occasioned by ordinary neglect. *Ibid.*

**OWNER.**

See **DAMAGES**, 4.

**PARENT.**

1. Of the nature and extent of parental power at common law.

*United States v. Bainbridge.* 71

See **MINOR**, 1.

**PARTNERSHIP.**

See **GUARANTY**, 1, 2, 5.

**PAROL EVIDENCE.**

See **EVIDENCE**, 1.

**PAROL ASSIGNMENT.**

See **PRIZE**, 4.

**PAROL AGREEMENT.**

See **PRIZE**, 2.

**PERSONAL CLAIM.**

See **ADVANCES**, 2.

**PERMIT.**

See **PLEADING**, 2.

**PATENT.**

1. The proceedings under the 10th section of the Patent Act, of 21st of February, 1793, ch. 11, are in the nature of a *scire facias* at the common law to repeal a patent. *Stearns v. Barrett.* 153

2. If a patent has been obtained by the plaintiff, upon the defendant's refusal to submit to an arbitration, according to the provisions of the 9th section of the Patent Act, and the defendant subsequently obtain a patent for the same invention, this is not conclusive proof, that the latter was obtained surreptitiously or upon false suggestion. *Ibid.*

3. The law entitles a party to a patent for a new and useful invention; and by "useful" is meant, not an invention in all cases superior to the modes now in use for the same purpose, but "useful,"

in contradistinction to frivolous and mischievous inventions.

*Lowell v. Lewis.* 182

4. The patentee must describe in his patent, in what his invention consists, with reasonable certainty, otherwise it is void for ambiguity. If it be an improvement in an existing machine, he must, in his patent, distinguish the new from the old, and confine his patent to such parts only as are new; for if both are mixed up together, and a patent is taken for the whole, it is void. *Ibid.*

5. If an invention is definitively described in the patent, so as to distinguish it from what is before known, the patent is good, although the specification does not describe the invention in such full, exact, and clear terms, that a person skilled in the art or science of which it is a branch, could construct or make the thing invented, unless such defective description or concealment were with intent to deceive the public. *Ibid.*

6. As among inventors, he who is first in time, has a prior exclusive right to the patent for the invention. *Ibid.*

7. A joint patent may well be for a joint invention, but not for a sole invention of one of the patentees. If each of the patentees obtains separate patents for the same invention, as his exclusive invention, and afterwards both obtain a joint patent for the same as their joint invention, they are estopped by their joint patent to assert any title under the several patents. *Barrett v. Hall.* 447

8. A patent may well be for a new combination of machines, whether the machines be old or new. But one patent cannot at the same time include an exclusive right in the combination and in each of the machines; and it is no infringement of a patent for the combination, to use either of the machines separately. *Ibid.*

9. There must be several patents for several improvements of distinct machines. *Ibid.*

10. A patent for an improved machine must show in the specification, in what the improvement precisely consists; and the patent be limited to those improvements. If not specified, the patent is void for ambiguity; if broader than the improvement, it is void on other grounds. *Ibid.*

11. Where a combination of machinery exists up to a certain point, and the patentee makes an improvement, he should not include in his patent the whole machinery, but only the improvement. *Ibid.*

12. If a party make an improvement on an existing machine, or invent a new machine, his patent should not be for a method, but for his machine, or improved machine. *Ibid.*

## PILOTAGE.

1. To make pilotage a lien on the ship, the contract must have been made by some person in the employment of the owner, duly authorized to make the contract, such as the master or the quasi master. But mere wrongdoers, or mutineers, have no authority to bind the ship. *The Anne.* 508

## PLEADING.

1. Upon a writ of error, if the verdict below was given upon an immaterial issue, a replender cannot be awarded; but judgment must be rendered against the party who committed the first fault, if there be sufficient matter on which to found such judgment.

*United States v. Burnham.* 57

2. In an information on the 50th section of the Collection Act of 1799, ch. 128, it is necessary to allege that the goods were unladen in some port or place within a collection district, without a permit from the collector of that port or district. But it will be sufficient

if the fact be so, to allege the port or district to be to the attorney unknown. *Ibid.*

3. Material matter, although alleged under a *videlicet*, is traversable, and must be proved as laid. Of the nature and office of a *videlicet*. Where immaterial matter may be rejected as surplusage or not.

4. It is no ground of a bill of exceptions that a Court refused to instruct the jury on a point of law, which was so stated that it involved an opinion on matters of fact, as where an opinion was prayed "under the circumstances of the case," which were not found as facts. *Ibid.*

5. The proceedings under the 10th section of the Patent Act, of 21st of February, 1793, ch. 11, are in the nature of a *scire facias* at the common law, to repeal a patent. Upon a judgment rendered on such a suit error lies to the Circuit Court.

*Stearns v. Barrett.* 152

6. A verdict which is repugnant or uncertain in a material point is void. *Ibid.*

7. The refusal of a Court to amend the verdict is not matter which can be assigned for error. *Ibid.*

8. Upon a trial under the general issue under the 10th section of the Patent Act, the burthen of proof, that the patent was obtained surreptitiously or upon false suggestion, lies on the plaintiff. *Ibid.*

9. The statute of limitations of New Hampshire, (which is in this respect, a transcript of the statute of 21st Jac. 1. ch. 16,) does not apply as a bar to an action of debt upon a dishonored bank note, against a stockholder in the bank, to recover the amount of the note under the provisions of the bank charter making the stockholders personally liable for such note in such case, for it is not founded upon any contract or lending without specialty.

*Bullard v. Bell.* 243

10. *Non cepit* in replevin, puts in issue the question of general property only, and not of special property; at least on a suit between the principal and his agent.

*Meany v. Head.* 319

11. On *non cepit*, the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another.

*Meany v. Head.* 319

12. A libel for a statute forfeiture should substantially agree with the terms of the statute, otherwise it is bad.

*The Betsy.* 354

13. In a libel on the 50th section of the Revenue Act of the 2d of March, 1799, ch. 128, it is not necessary to allege the goods to be of foreign growth or manufacture. *Ibid.*

14. A party who means to except to the jurisdiction of the Court, in a case of seizure, must plead to that jurisdiction. If he files a claim and plea to the merits, on which the parties are at issue, it is a waiver of any exception to the jurisdiction. On such claim and plea no question as to the place of seizure is before the Court. *The Abby.* 360

15. Upon a hearing on an issue on a plea in bar to a bill in chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact.

*Hughes v. Blake.* 515

16. The defendant's answer in support of his plea is good evidence; and unless disproved by two witnesses, or by one witness and very strong circumstances, it must prevail in his favor.

*Ibid.*

17. Under what circumstances a plea of a former judgment at law for the same cause of action, is a good bar in equity. *Ibid.*

## POLICY.

See INSURANCE, 1, 2, 3, 4, 5, 6.

## PORT.

1. Where a vessel has been cap-

tured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored. *Sampayo v. Sailer*. 43

See INFORMATION, 1.

SHIPPING ARTICLES, 3.  
VOYAGE.

## PRACTICE.

1. After an appeal, the Court may allow evidence, not received in season, to be made a part of the case, to be put upon the record *de bene esse*, with a memorandum of the fact.

*The London Packet*. 14

2. In general the Prize Court will not trust a claimant with an order for farther proof, who has shown himself capable of abusing it. *The San Jose Indiano*. 38

3. The claimant when he prevails, is entitled to such costs as have necessarily arisen in the prosecution of his claim.

*The Ulpiano*. 91

4. In assumpsit against a consignee or bailiff of goods "to sell the same and render a reasonable account," damages for not remitting when exchange was favorable, are not allowable.

*Quere*, how it would be if there was a special promise to remit, and a breach assigned in the declaration? *Pope v. Barrett*. 117

5. Interest is allowable in actions against a consignee or bailiff of goods "to sell the same and render a reasonable account," and also in actions for money had and received from the time of a demand made, when the defendant has refused to account or to make payment, or has converted the money to his own use. *Ibid*.

6. In proceedings *in rem* upon a bond for the appraised value given jointly and severally, if one of the obligors dies, the Court will proceed against the survivor, or, at the option of the plaintiffs, against the representatives of the deceased also. *The Octavia*. 149

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## PRESUMPTION.

See EVIDENCE, 3.

## PRIZE.

1. Prize money must be distributed according to some written agreement of the parties; otherwise it is distributable according to the 4th section of the Prize Act of the 26th of June, 1812, ch. 107.

*The Dash*. 4

2. A parol agreement as to distribution is void. *Ibid*.

3. If the shipping articles omit to state the shares to which some of the officers and crew are entitled, they are still entitled to claim their shares under the Prize Act. *Ibid*.

4. A parol assignment of a share in prizes is void. *Ibid*.

5. When the captors have been guilty of irregularity in not bringing in the papers, or the master of the captured ship, farther proof will be ordered.

*London Packet*. 14

6. Where property is shipped in an enemy's vessel, the presumption of its being enemy's property can only be repelled by strong and clear proofs of a neutral interest. *Ibid*.

7. Circumstances leading to condemnation. *Ibid*.

8. The consul of a nation may claim on behalf of its subjects in the absence of any authorized agent. *Ibid*.

9. After an appeal, the Court may allow evidence not received in season to be made a part of the case, to be put upon the record *de bene esse* with a memorandum of the fact. *Ibid*.

10. Probable cause is a sufficient justification of a capture. But such protection may be forfeited by subsequent misconduct or negligence. *The George*. 24

11. What constitutes probable cause. *Ibid*.

12. Effect of false and simulated papers. *Ibid*.

13. Captors are bound to good faith and ordinary diligence; and

are therefore liable for ordinary negligence. *Ibid.*

14. To constitute probable cause for capture it is not necessary that there should be *prima facie* evidence to condemn. It is sufficient if there be circumstances which warrant a reasonable suspicion of illegal conduct. *Ibid.*

15. In general the Prize Court will not trust a claimant with an order for farther proof, who has shown himself capable of abusing it. *The San Jose Indiano.* 38

16. Every shipment remains on the account and risk of the shippers, unless there be an express or implied authority to change the proprietary interest, and put the shipment at the risk of the consignee. *Ibid.*

17. Defects of the case on farther proof inflame suspicions. Circumstances leading to condemnation. *Ibid.*

18. Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored.

*Sampayo v. Salter.* 43

19. The effect of capture upon the contract for mariners' wages.

*Emerson v. Howland.* 45

20. If a claim be interposed by the United States in a prize proceeding upon a seizure for a forfeiture under the non-importation Acts, and the title of the captors and the claimants be defeated; the property will be condemned to the United States, subject to distribution according to the provisions of the Act of 2d March, 1799, ch. 128, § 91.

*The Brig Gefla.* 88

21. Damages decreed for the amount of goods taken out of a prize captured after the treaty of peace of 1815.

*The Ulpiano.* 91

22. Costs when allowed in prize causes. *Ibid.*

23. Where a cruise was broken

up by the wrongful desertion of the crew, after the privateer returned to her home port in consequence of distress, and the owners were thereby obliged to abandon the cruise, and a new one was undertaken by a crew composed partly of the old crew, and partly of other persons, it was held that the first cruise was completely determined, and that no persons employed in the *first* cruise and not in the second cruise, were entitled to shares in prizes made in the second cruise.

*Blanchard v. Haven.* 346

See INSURANCE, 5.

#### PRIZE COURT.

1. In general the Prize Court will not trust a claimant with an order for farther proof, who has shown himself capable of abusing it. *The San Jose Indiano.* 38

#### PRIZE MONEY.

1. Prize money must be distributed according to some written agreement of the parties, otherwise it is distributable according to the 4th section of the Prize Act of the 26th of June, 1812, ch. 107. A parol agreement as to distribution is void. *The Dash.* 4

2. If the shipping articles omit to state the shares, to which some of the officers and crew are entitled, they are still entitled to claim their shares under the Prize Act. *Ibid.*

3. A parol assignment of a share in prizes is void. *Ibid.*

#### PROBABLE CAUSE.

1. Probable cause is a sufficient justification for a capture. But such protection may be forfeited by subsequent misconduct or negligence. *The George.* 94

2. What constitutes probable cause. *Ibid.*

3. To constitute probable cause for capture it is not necessary that there should be *prima facie* evidence to condemn. It is sufficient if there be circumstances



which warrant a reasonable suspicion of illegal conduct. *Ibid.*

4. If an officer of the revenue seize goods without probable cause, he is responsible for all losses and injuries, however occasioned. If with probable cause, he is responsible only for losses and injuries occasioned by ordinary neglect.

*Burke v. Trevitt.* 96

### PROCEEDINGS *IN REM*.

1. After process served in proceedings *in rem*, the thing is decreed in the custody of the Court, though in the actual possession of the collector, &c. under the Act of 1799. *Burke v. Trevitt.* 96

2. In proceedings *in rem*, upon a bond for the appraised value given jointly and severally, if one of the obligors dies, the Court will proceed against the survivor, or, at the option of the plaintiffs, against the representative of the deceased also.

*Ship Octavia.* 149

### PROOF.

See EVIDENCE, 2, 3, 10.

### PROTEST.

See BILLS OF EXCHANGE, 2.

### REIMBURSEMENT.

1. If a consignee of goods agree that for advances made "he will hold for reimbursement on the amount of the net proceeds of said goods, which are only considered answerable for said amount advanced," it is a waiver of any personal claim against the owner for reimbursement.

*Peisch v. Dickson.* 10

### REGISTRY.

See SHIPS, 1.

### REMAINDER.

See DEVISE, 1.

### REMEDY.

See ACTION.

### REMITTANCE.

See DAMAGES, 3.

### REPUGNANCY.

See PLEADINGS, 6.

### REPLEVIN.

1. Replevin does not lie unless there has been an unlawful taking from the possession of another. If after a bailment of goods, they are unlawfully converted or detained, *detinue* or *trover*, and not replevin, is the proper remedy.

*Meany v. Head.* 319

### REVENUE.

1. Debt lies in favor of the United States against the importer for the duties due on goods imported.

*United States v. Lyman.* 482

2. The right to duties accrues by the importation with an intent to unlade; and immediately upon the importation the duties become a personal charge and debt on the importer.

*Ibid.*

3. A bond taken at the Custom-House to secure the duties due by the importer is not an extinguishment of the debt so accruing, but merely security for its payment.

*Ibid.*

4. No person but the owner or consignee, or, in case of his sickness or absence, his agent or factor, is by the revenue laws, entitled to enter and bond goods at the Custom-House. A sub-purchaser after importation has no such right.

*Ibid.*

5. The collector has no authority, to receive the bond of any person as security for the payment of duties, except such person be legally entitled to enter them.

*Ibid.*

6. Debt lies against the importer for the duties on smuggled goods. So where by mistake, accident, or fraud, no bond is given to secure them. So where short duties only have been paid. *Ibid.*

7. An information of debt, or an information in the nature of a

bill of discovery and account, is a proper remedy for the United States in such cases. *Ibid.*

### REVOLT.

1. An endeavour to make a revolt within the Act of 30th of April, 1790, ch. 9, § 12, is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship.

*United States v. Smith.* 147

2. On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the Act of the 30th April, 1790, ch. 9, it is not necessary to prove, that it was committed on the high seas.

*United States v. Hamilton.* 443

### RISK.

1. Every shipment remains on the account and risk of the shippers, unless there be an express or implied authority to change the proprietary interest, and put the shipment at the risk of the consignee.

*The San Jose Indiano.* 38

See INSURANCE, 4, 5, 6.

### SALVAGE.

Of salvage in cases of derelict. In general a moiety is the rule of salvage in cases of derelict; but it is a flexible rule, yielding to circumstances. *The Brig* —. 372

### SCIRE FACIAS.

See PLEADING, 5.

### SEAMEN.

1. Of the effect of capture upon the contract for mariners' wages.

*Emerson v. Howland.* 45

2. Where seamen are discharged abroad without the payment of the three months' wages required by the Act of Congress of the 28th of February, 1803, ch. 62, on a libel for wages the Court will enforce the payment of the three months' wages. *Ibid.*

3. Where an embezzlement takes place on board of a ship, the seamen are not liable to contribute out of their wages, unless it was caused by their fraud, connivance, or negligence; or, if the offender is unknown, unless a presumption of guilt is fixed upon all the crew, or at least on those who are called upon to contribute.

*Spurr v. Pearson.* 104

4. One seaman may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the event of the suit.

*Ibid.*

5. An endeavour to make a revolt within the Act of the 30th of April, 1790, ch. 9, § 12, is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship.

*United States v. Smith.* 147

6. If the master of a ship, after the commencement of the voyage, be by sickness disabled from pursuing it, and a new master is appointed, the shipping contract with the seamen is not dissolved thereby.

*United States v. Hamilton.* 443

### SECURITY.

1. A factor has by the general law, the personal security of the owner, as well as a lien on the goods for advances, but by contract he may waive the right to a personal responsibility.

*Peisch v. Dickson.* 9

2. In what cases the taking of a higher security operates as an extinguishment of a debt and in what cases not. When such security is given by the debtor, *prima facie* the law presumes it intended as an extinguishment of the debt. *Aliter*, where it is the bond of a third person.

*United States v. Lyman.* 482

See LIEN, 4.

**SEIZOR.**See **SEIZURE.****SEIZURE.**

1. If an officer of the customs seizes goods, a party who resists the seizure is not guilty of concealment within the statute, merely by such act of resistance; although the goods are taken away and wholly removed from the custody of the officer in consequence thereof.

*United States v. Furnsworth.* 1

2. If a claim be interposed by the United States in a prize proceeding upon a seizure for a forfeiture under the non-importation Acts, and the title of the captors and the claimants be defeated; the property will be condemned to the United States, subject to distribution according to the provisions of the Act of 2d March, 1799, ch. 128, § 91.

*The Brig Gefla.* 88

3. The officers of the Court, who have the custody of property seized, pending the suit, are responsible for any loss or injury sustained by want of due diligence.

*Burke v. Trevitt.* 96

4. If an officer of the revenue seize goods without probable cause, he is responsible for all losses and injuries however occasioned. If with probable cause, he is responsible only for losses and injuries occasioned by ordinary neglect.

*Ibid.*

5. When a seizure is made within the limits of a judicial district, the District Court of that district has exclusive original cognizance thereof. And if brought into another district, the Court will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any District Court into which the property is brought.

*The Abby.* 360

6. If a seizure be abandoned, no jurisdiction attaches to any court, unless there be a new seizure. But to constitute such an

abandonment, there must be an unequivocal act of dereliction.

*The Abby.* 360

7. If after seizure of a ship, the master agrees to navigate her into port under the direction of the seizer, and then to give her again into the possession of the seizer, this is no abandonment, although in consequence of such agreement the seizer's crew are withdrawn from the ship.

*Ibid.*

8. A party, who means to except to the jurisdiction of the court in a case of seizure, must plead to that jurisdiction. If he files a claim and plea to the merits, on which the parties are at issue, it is a waiver of any exception to the jurisdiction. On such claim and plea, no question as to the place of seizure is before the Court.

*Ibid.*

9. After a final decree of condemnation unappealed from, in a case of seizure by a collector for a breach of the revenue laws, the Secretary of the Treasury has no authority to remit the collector's share of the forfeiture. It is a vested and absolute right.

*The Brig Hollen.* 431**SHARE.**

1. Prize money must be distributed according to some written agreement of the parties, otherwise it is distributable according to the 4th section of the Prize Act of the 26th of June, 1812, ch. 107. A parol agreement as to distribution is void.

*The Dash.* 4

2. If the shipping articles omit to state the shares, to which some of the officers and crew are entitled, they are still entitled to claim their shares under the Prize Act.

*Ibid.*

3. A parol assignment of a share in prizes is void.

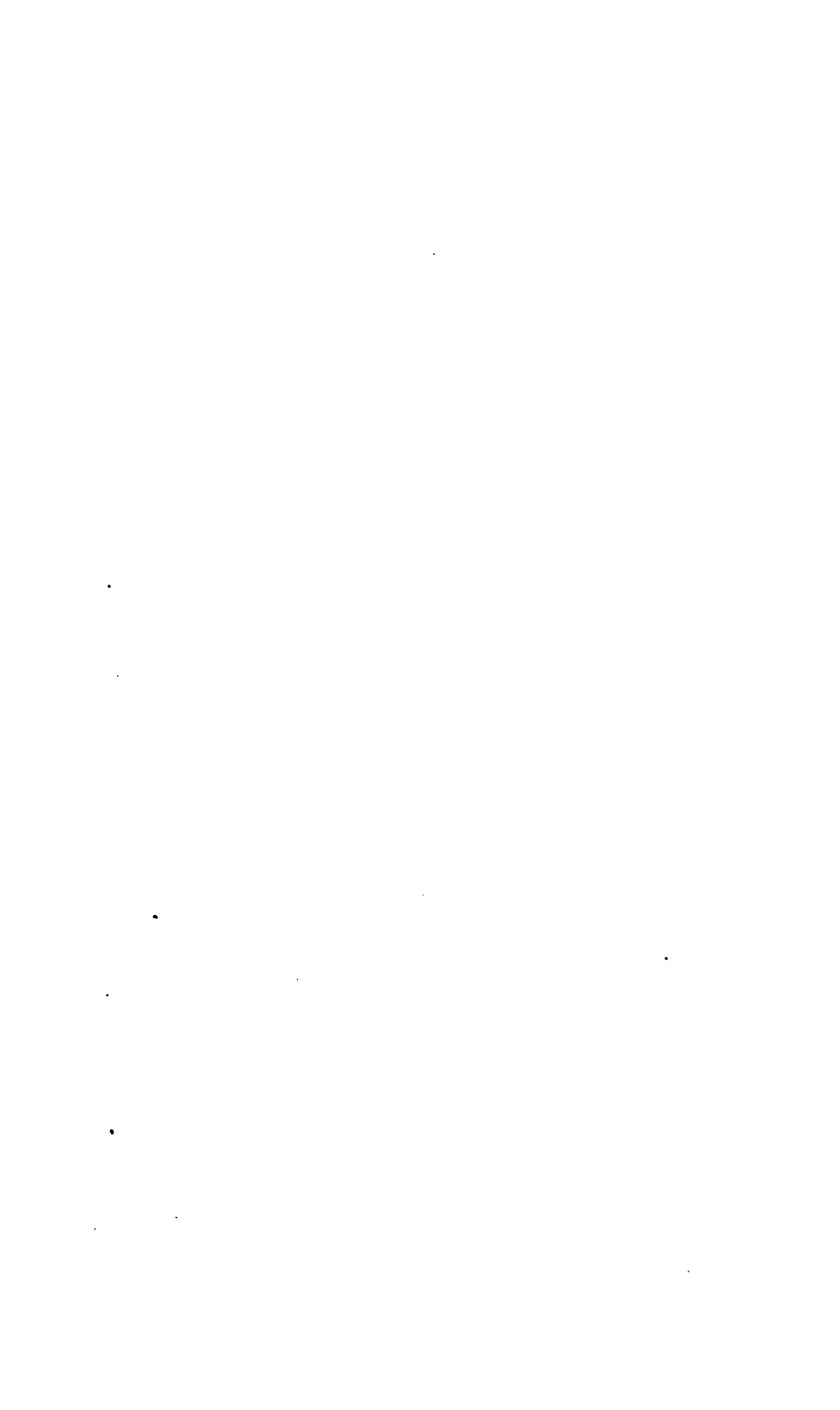
*Ibid.*

4. Where a cruise was broken up by the wrongful desertion of the crew, after the privateer returned to her home port in consequence of distress, and the owners were thereby obliged to aban-

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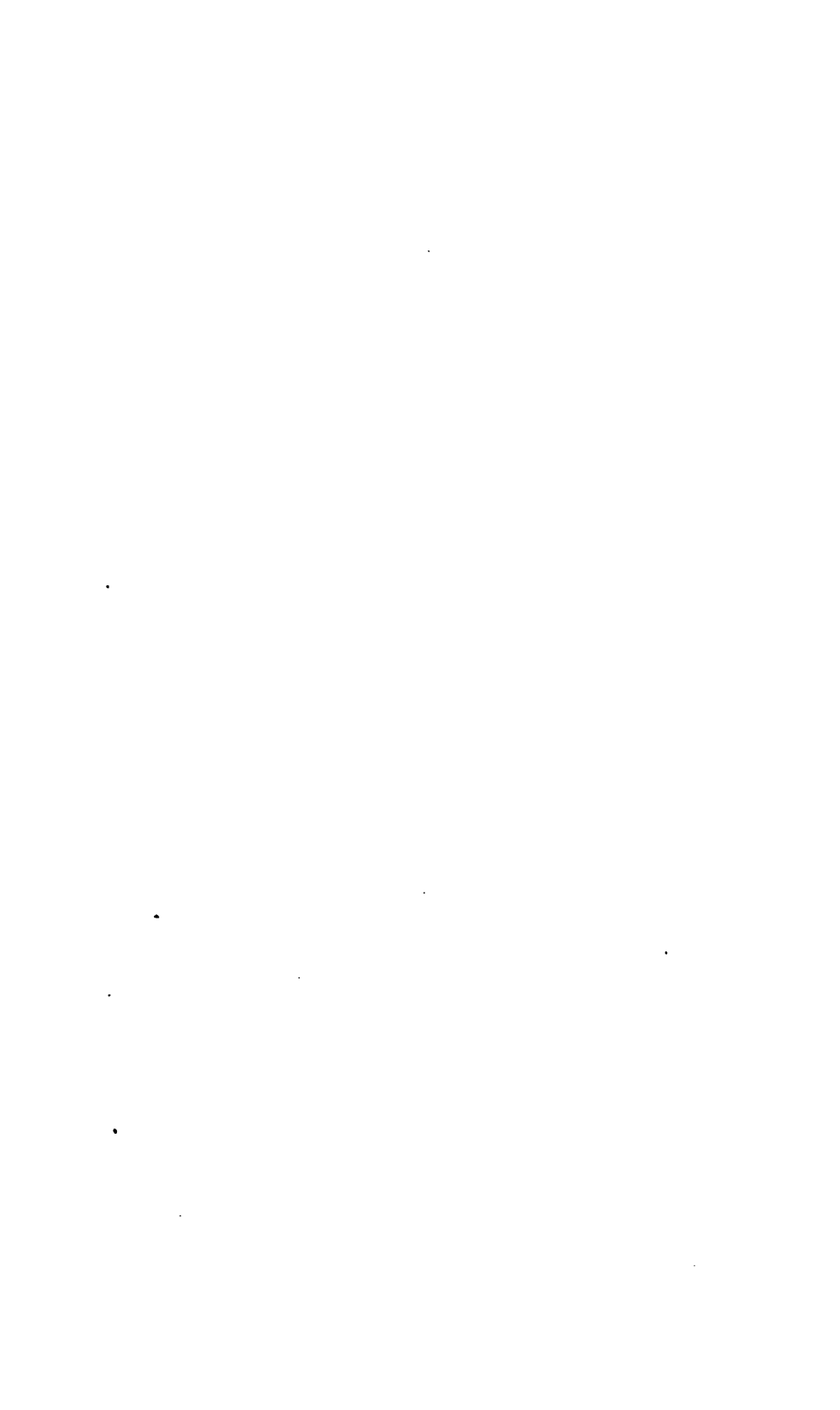




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